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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
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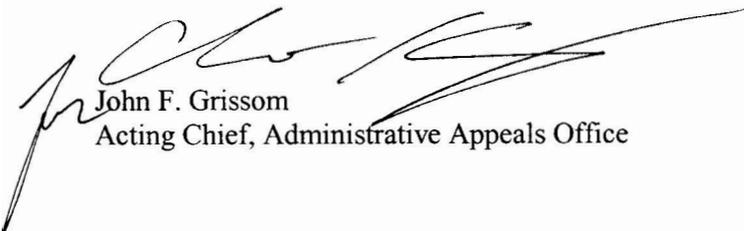
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

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 Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion. The motion will be granted and the previous decision of the AAO will be affirmed.

The petitioner seeks immigrant classification under 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 a United States citizen.

The director denied the petition on February 16, 2007, on the basis of his determination that, because she had been divorced for longer than two years at the time she filed the petition, the petitioner had failed to establish the existence of a qualifying relationship with a United States citizen. The petitioner filed a timely appeal, which the AAO dismissed on January 7, 2009. In its decision, the AAO concurred with the director's February 16, 2007 denial. The AAO also found that the petitioner had failed to establish that she had been the victim of ineffective assistance of prior counsel. The AAO also found further that, beyond the director's decision, the record of proceeding failed to establish that the petitioner is a person of good moral character.

Counsel filed the instant matter on February 6, 2009, and marked the box at Part 2 of the Form I-290B to indicate that she was filing both a motion to reopen and a motion to reconsider. Upon review, the AAO finds that counsel's submission does not satisfy the requirements of a motion to reopen.

8 C.F.R. 103.5(a)(2) states, in pertinent part, the following:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

Based upon the plain meaning of the word "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

On motion, counsel submits the following evidence:

- A March 12, 2007 self-affidavit from the petitioner; and
- The petitioner's February 28, 2007 bar complaint against her previous attorney; and
- Letters, dated January 23, 2009, written by counsel to the petitioner's previous attorneys.

This additional evidence was previously available: the petitioner's March 12, 2007 self-affidavit and February 28, 2007 are not new; both documents are dated prior to the filing of the petitioner's appeal

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

on March 16, 2007, and the assertions made by counsel in his January 23, 2009 letters to the petitioner's previous attorneys are already contained in the record of proceeding.²

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With this motion, the self-petitioner has not met that burden. Counsel's submission does not qualify as a motion to reopen.

The regulation at 8 CFR 103.5(a)(2) states, in pertinent part the following:

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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel's submission satisfies the requirements of a motion to reconsider, and the AAO will therefore adjudicate this matter as a motion to reconsider.

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

² Even if the statements made by counsel in his January 23, 2009 letters were not contained in the record of proceeding, and the AAO were to adjudicate counsel's submission as a motion to reopen, this letter would not aid the petitioner in establishing her claim that she was the victim of the ineffective assistance of her previous counsel. Counsel submits this letter on motion in order to comply with the second *Lozada* requirement for establishing such a claim, which requires that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him, and be given an opportunity to respond. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). However, this letter was not prepared until January 23, 2009, nearly three years after the petition was filed in March 2006. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

- (CC) who was a bona fide spouse of a United States citizen 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 or renounced citizenship 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 United States citizen spouse. . . .

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) 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 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)(A)(iii) . . . 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(b)(2)(A)(i) . . . of the Act based on that relationship [to the U.S. citizen spouse].

* * *

- (vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other

behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

The evidentiary standard and guidelines for a self-petition filed under section 204(a)(1)(A)(iii) 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. . . .

* * *

- (v) *Good moral character.* Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for

six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

The pertinent facts and procedural history of this case were set forth in the AAO's January 7, 2009 decision, incorporated here by reference. As such, the AAO will only repeat such facts as necessary here. The petitioner, a citizen of Vietnam, married D-Q-³ a citizen of the United States, on January 17, 2001. The petitioner filed for divorce on or around May 10, 2003, and the divorce became final on November 11, 2003. The petitioner filed the instant Form I-360 on March 27, 2006, more than two years after the couple divorced, and the director denied the petition on February 16, 2007. On motion, counsel states that the AAO erred in its January 7, 2009 decision dismissing the appeal. Specifically, counsel contends that AAO erred in its determination that the petitioner had failed to establish that she had a qualifying relationship with a citizen of the United States and that she is a person of good moral character.

Qualifying Relationship and Eligibility for Classification as an Immediate Relative

The AAO affirms its January 7, 2009 determination that the petitioner has failed to establish the existence of a qualifying relationship with a United States citizen. In making that determination, the AAO found that, because the petitioner and D-Q- had been divorced for longer than two years at the time the petition was filed, she did not meet any of the criteria set forth at 204(a)(1)(A)(ii)(II)(aa)(CC), which allow certain individuals who are no longer married to a citizen of the United States to self-petition. Counsel and the petitioner concede that the petitioner and D-Q- had been divorced for longer than two years at the time the petition was filed: the petitioner's divorce from D-Q- became final on November 11, 2003, but she did not file the Form I-360 until March 27, 2006.

Counsel asserted on appeal that the petitioner was the victim of ineffective assistance of the two attorneys who assisted her in filing the Form I-751 and that, as such, the statutory limitation contained in section 204(a) of the Act as it relates to the petitioners who are divorced at the time of filing the Form I-360 should have been equitably tolled.

In its January 7, 2009 decision, the AAO rejected counsel's claims that the petitioner had been the victim of the ineffective assistance of previous counsel. As was noted by the AAO, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or

³ Name withheld to protect individual's identity.

competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The AAO noted further that the Ninth Circuit Court of Appeals, within whose jurisdiction this case falls, has held that strict adherence to *Lozada* is not required when the record clearly shows the ineffective assistance of counsel. See *Escobar-Grijalva v. I.N.S.*, 206 F.3d 1331, 1335 (9th Cir. 2000) (deportation hearing transcripts showed immigration judge's own confusion over alien's representation by counsel and alien equivocally answered immigration judge's questions regarding alien's representation by counsel, whom she had never met before, to represent her); *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 526 (9th Cir. 2000) (record of proceedings documented prior counsel's failure to timely file alien's application for suspension of deportation); *Ontiveros-Lopez v. I.N.S.*, 213 F.3d 1121 (9th Cir. 1999) (record showed that former counsel conceded alien's deportability, sought relief for which the alien was statutorily ineligible and that new counsel could not comply with *Lozada* given his late receipt of the alien's file).

However, the AAO found that as the record of proceeding in the petitioner's case did not clearly demonstrate the ineffectiveness of her prior counsel, analysis under *Lozada* was appropriate. The AAO found that because the record contained no description of the petitioner's agreement or relationship with her previous attorneys with respect to the specific actions that were to be taken and what representations they did or did not make to the petitioner in this regard, the petitioner had not complied with the first *Lozada* requirement. The AAO found that because the record did not indicate whether the petitioner's previous attorneys had been informed of the allegations leveled against them, and been given the opportunity to respond, the petitioner had not satisfied the second *Lozada* requirement. The AAO noted that although the petitioner did file a bar complaint with the State Bar of California, as required by the third *Lozada* requirement, she did not file that complaint until after the director had already denied the Form I-360. The AAO found that, for all of these reasons, the petitioner had not established that she had been the victim of the ineffective assistance of her previous counsel.

Finally, the AAO found that, even if the petitioner had adequately established a claim of ineffectiveness of counsel against her former attorneys, she has not established that the claim would have tolled the statutory limitation contained in section 204(a) of the Act as it relates to petitioners who are divorced at the time of filing the Form I-360, because that statutory time limitation is not a statute of limitation but rather a statute of repose.

As was noted previously, 8 C.F.R. § 103.5(a)(2) states that a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. The petitioner, therefore, must establish that the AAO's January 7, 2009 decision was incorrect based upon the evidence of record before it when it made that decision. As such, it may not consider counsel's January 23, 2009 letters to the petitioner's previous attorneys.

The AAO affirms its January 7, 2009 determination that the record of proceeding does not clearly demonstrate the ineffectiveness of her prior counsel. The AAO notes that the petitioner did not file the ineffective assistance of counsel complaints until February 2007, after the Form I-360 petition had already been filed. If her previous attorneys' assistance was so clearly ineffective, it is unclear to the AAO why neither counsel nor the petitioner mentioned such ineffective assistance until after the petition had already been denied. Analysis of this matter under *Lozada* is appropriate.

As noted previously, the second *Lozada* criterion requires that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond. The record before the AAO at the time it issued its January 7, 2009 decision contained no evidence that the attorneys whose integrity or competence were being impugned by the petitioner had been informed of the allegations leveled against them, and had been given an opportunity to respond. On motion, counsel states that the "[p]etitioner has included proof of her informing those attorneys of the charges against them along with this motion." Counsel's proof that the petitioner notified the attorneys whose integrity or competency is being impugned consists of two letters, dated January 23, 2009, that he wrote to the petitioner's previous attorneys. Because these letters were not prepared until after the AAO's decision, they fail to satisfy the second *Lozada* requirement, as they were not before the AAO when it issued that decision. Again, the regulation at 8 C.F.R. § 103.5(a)(2) states that a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Finally, the petitioner's ineffective assistance of counsel claim fails because she did not raise the issue until after the petition had already been denied. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

For all of these reasons, the AAO affirms its January 7, 2009 determination that the petitioner has failed to establish that she was the victim of the ineffective assistance of previous counsel. As the petitioner failed to establish that she was the victim of the ineffective assistance of her previous counsel, she has failed to establish that the filing deadline in her case warrants equitable tolling.

However, even if the petitioner had established the ineffective assistance of her prior attorneys, the AAO also affirms its January 7, 2009 determination 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 repose not subject to equitable tolling, rather than a statute of limitations that is subject to equitable tolling.

On motion, counsel contends 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, that the AAO's analysis was erroneous, and that due to the equities involved in this case, the statutory limitation contained in section 204(a) of the Act as it relates to the petitioners who are no longer married at the time of the filing of the Form I-360 should be tolled.

As the AAO noted in its January 7, 2009 decision, the 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). 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.

The AAO also noted that 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 (3^d Cir. 2005); *Pervais v. Gonzalez*, 405 F.3d 488, 490 (7th Cir. 2005). The AAO also noted that, in contrast, 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 Act (NACARA)⁴ 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).

As was noted previously, the court in *Munoz* held that the filing deadline for special rule cancellation under NACARA is a statute of repose not subject to equitable tolling. See *Munoz v. Ashcroft*, 339 F.3d at 957. On the other hand, the court in *Albillo-DeLeon* held that the time limit for filing motions to reopen under NACARA is a statute of limitations subject to equitable tolling. See *Albillo-DeLeon v. Gonzalez*, 410 F.3d at 1098. In distinguishing between NACARA’s filing deadline for special rule cancellation and the time limit for filing motions to reopen, the court in *Albillo-DeLeon* stated the following:

[I]n *Munoz*, we were asked to determine whether section 203(a) of NACARA was subject to equitable tolling . . . Section 203(a) identifies the threshold requirements for NACARA eligibility. To qualify for relief under NACARA, section 203(a) required that an alien file an asylum application by April 1, 1990, and apply for certain benefits by December 31, 1991. In *Munoz*, the petitioner applied for asylum on August 23, 1997, shortly after he turned eighteen years old . . . The petitioner argued that the eligibility filing dates should be equitably tolled until one year after he reached the age of majority. . . .

⁴ Nicaraguan Adjustment and Central American Relief Act, Pub.L. No. 105-100, 111 Stat. 2160 (1997), amended by Pub.L. No. 105-139, 111 Stat. 2644 (1997).

We disagreed, concluding that the NACARA eligibility filing deadlines (April 1, 1990, and December 31, 1991) are cut-off dates . . . Noting that section 203(a) is “fixed by statute and unrelated to any variable,” as serves to define and close class eligibility, we deemed the provision a jurisdictional statute of repose and therefore not subject to equitable tolling”

The government contends that this case is analogous to *Munoz*, and that we should conclude that section 203(c), like 203(a), is jurisdictional and not subject to equitable tolling. For the reasons set forth below, we find that section 203(c) is readily distinguishable from section 203(a).

First, section 203(a) involved a threshold condition for eligibility under NACARA. Section 203(c), on the other hand, serves a more limited purpose and applied to a smaller group—namely, to only those aliens who have *already complied* with section 203(a)’s filing deadlines [emphasis in original]. *Albillo-DeLeon* has already met section 203(a)’s threshold requirements. . . .

In addition, section 203(c), unlike section 203(a), does not identify a specific cutoff date by which a petitioner must file his or her motion . . . Rather, section 203(c) states that the filing deadline “shall begin not later than 60 days after the date of enactment of the [NACARA] and shall extend for a period not to exceed 240 days” but allows the Attorney General discretion in fixing the date. . . .

Finally, as discussed above, the legislative history suggests that Congress intended that motions to reopen be subject to equitable tolling . . . The government is correct in noting that where the plain meaning of a statute is clear, the sole function of the courts is to enforce the statute. . . .

Id. at 1097-98.

The AAO finds that the two-year, post-divorce filing period contained at section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act is more similar to the filing deadline for special rule cancellation under NACARA analyzed by the court in *Munoz* rather than to the time limit for filing motions to reopen under NACARA analyzed by the court in *Albillo-DeLeon*. As noted previously, the court in *Munoz* found that the filing deadline for special rule cancellation under NACARA is a statute of repose not subject to equitable tolling, and the court in *Albillo-DeLeon* found that the time limit for filing motions to reopen under NACARA is a statute of limitations subject to equitable tolling.

In arriving at its conclusion 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 repose not subject to equitable tolling, and similar to the filing deadline at issue in the *Munoz* case, the AAO notes that in distinguishing section 203(c) of NACARA, which it had previously determined to be a statute of repose not

subject to equitable tolling, from section 203(a), the Ninth Circuit in *Albillo-DeLeon* noted that section 203(a) had involved a threshold condition for eligibility under NACARA, but that section 203(c) served a smaller group: only those who had already complied with section 203(a). The AAO finds that such is the case with section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act. Section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act involves a threshold condition for eligibility for the filing of a self-petition under section 204(a)(1)(B)(ii) of the Act. Every individual filing a self-petition under section 204(a)(1)(B)(ii) of the Act as an alien battered or subjected to extreme cruelty by a lawful permanent resident of the United States must establish that he or she has a qualifying relationship with a lawful permanent resident of the United States. In cases where the allegedly abusive spouse has lost his or her status as a lawful permanent resident of the United States, the petition must be filed within two years of the date such permanent residence was lost. Otherwise, there is no qualifying relationship. If there is no qualifying relationship, then the alien is not, pursuant to section 204(a)(1)(B)(ii)(I) of the Act, “an alien who is described in subclause (II) [who] may file a petition.”

As such, the language of the statute states that, if the two-year, post-legal termination filing period of section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act is not met, then, pursuant to section 204(a)(1)(B)(ii)(I) of the Act, the alien is not eligible for immigrant classification under the abused spouse provisions. The AAO, therefore, finds the two-year, post-legal termination filing period of section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act to be a threshold requirement for eligibility. It does not find the reasoning of the court in *Albillo-DeLeon* controlling on this point. Rather, it finds the statute at issue here more akin to the statute analyzed by the court in *Munoz*, which found that statute to be a statute of repose not subject to equitable tolling.

The AAO also finds that section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act specifies a specific cut-off date, unlike that statute at issue in *Albillo-DeLeon*. As was noted previously, the statute at issue in *Albillo-DeLeon*, section 203(c) of NACARA, stated that the filing deadline “shall begin not later than 60 days after the date of enactment of the [NACARA] and shall extend for a period not to exceed 240 days,” but allowed the Attorney General (now the Secretary of Homeland Security) discretion in fixing the date. Section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) sets a firm, two-year deadline for filing. In contrast, section 203(c) of NACARA allowed the Secretary of Homeland Security the discretion to establish her own date for the filing deadline, so long as it was no less than 60 days, and no more than 240 days. Section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act afforded the Secretary of Homeland Security no such discretion. Again, the AAO does not find the reasoning of the court in *Albillo-DeLeon* controlling on this point, and finds the statute at issue here more akin to the statute analyzed by the court in *Munoz*. It finds that the two-year, post-legal termination filing period of section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act does in fact identify a specific cut-off date: within two years from the date the lawful permanent resident spouse loses his or her status.

Although counsel looks to the legislative history behind the Violence Against Women Act, the AAO finds such an inquiry unnecessary as, pursuant to the previous discussion, the plain language of section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) shows that the statute is jurisdictional, and therefore a statute of repose. In the present matter, the AAO will not consider the legislative history of the

applicable law or the related floor statements. Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

Even if an examination of legislative history were warranted, the provisions cited by counsel are inapplicable to the present issue. Counsel asserts that the amendments to the Act made by the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162 (Jan. 5, 2006) “were enacted in order to expand access for self-petitioners.” Specifically, counsel claims that in VAWA 2005, “Congress made clear its intent to allow petitioners to file motions to reopen their cases in which they would have otherwise been barred.” However, the waiver of time and numerical limitations only applies to motions to reopen removal, deportation or exclusion proceedings; not Form I-360 adjudications. VAWA 2005 § 825. Contrary to counsel’s assertion, the provisions of VAWA 2005 that expanded eligibility for certain aliens to self-petition also imposed jurisdictional time limits. *See* VAWA 2005 amendments codified at sections 204(a)(1)(D)(v) of the Act (allowing certain children to self-petition up to age 25); 204(a)(1)(A)(vii) of the Act (imposing two-year deadline for parents of former U.S. citizen abusers) and VAWA 2005 § 823 (adding two-year cutoff dates for sponsors of aliens eligible for lawful permanent residence under the Cuban Adjustment Act).

For all of these reasons, the AAO finds that counsel has failed to establish that section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act is a statute of limitations subject to equitable tolling.

The AAO, therefore, finds that the petitioner has failed to establish that she was the victim of ineffective assistance of her previous counsel. Moreover, even if she established the ineffective assistance, the AAO finds that the two-year, post-legal termination filing period of section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act is a statute of repose not subject to equitable tolling. Accordingly, the AAO affirms its January 7, 2009 determination that the petitioner has failed to establish the existence of a qualifying relationship with a United States citizen, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act.

Good Moral Character

The AAO also affirms its January 7, 2009 determination that the petitioner has failed to establish that she is a person of good moral character. In making that determination, the AAO noted that, pursuant to 8 C.F.R. § 204.2(c)(2)(v), the primary evidence of the petitioner’s good moral character is an affidavit from the petitioner, accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. The AAO found that, as the petitioner did not submit a local police clearance or state-issued criminal background check, she had failed to establish that she is a person of good moral character. The AAO found that, although the director did not address this matter in his February 16, 2007 denial of the petition, this matter further precluded approval of the petition, beyond the decision of the director.

On motion, counsel asserts that the AAO's determination was erroneous for two reasons. First, counsel asserts that the petitioner's "due process rights were violated by the AAO's raising of this issue on appeal for the first time." Second, counsel asserts that the petitioner is not required to submit the local police clearance or state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition in order to establish that she is a person of good moral character.

The AAO disagrees with counsel's assertion that the petitioner's due process rights have been denied. As the AAO specifically noted in its January 7, 2009 decision, 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).

Nor does the AAO agree with counsel's assertion that submission of a local police clearance or state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition is not required in order to demonstrate that the petitioner is a person of good moral character. In support of this assertion, counsel looks to the language of 8 C.F.R. § 204.2(c)(2)(v), which states, in pertinent part, the following:

Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

Counsel contends that the petitioner's affidavit that constitutes primary evidence of the petitioner's good moral character and that, because the local police clearance or a state-issued criminal background check is merely secondary evidence, failure to submit that document cannot be a basis to deny the petition.

The AAO does not find counsel's argument persuasive. Counsel is correct in his assertion that the regulation requires that USCIS consider other credible evidence of the petitioner's good moral character. The AAO did consider the petitioner's other evidence and, in the absence of the local police clearance or a state-issued criminal background check, found it to be insufficient. Pursuant to the statute and regulation, the determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of USCIS. *See* Section 204(a)(1)(J) of the Act, 8 U.S.C. §1154(a)(1)(J); 8 C.F.R. § 204.2(2)(i). The petitioner has submitted no explanation for her failure to obtain a local police clearance or a state-issued criminal background check. The AAO finds that the petitioner has failed to establish that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Conclusion

Counsel's submission failed to qualify as a motion to reopen. Although counsel's submission did qualify as a motion to reconsider, that submission fails to sustain the petitioner's burden. A motion to reconsider must establish that the decision was based on an incorrect application of law or USCIS policy based on the evidence of record at the time the decision was rendered. 8 C.F.R. § 103.5(a)(3). Counsel has demonstrated no misapplication of law or policy in the AAO's January 7, 2009 decision and his motion to reconsider that decision will consequently be dismissed. *Id.* at § 103.5(a)(4) (A motion that fails to meet the applicable requirements shall be dismissed.). The petitioner has failed to demonstrate the existence of a qualifying relationship with a United States citizen or that she is a person of good moral character.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The January 7, 2009 decision of the Administrative Appeals Office is affirmed.