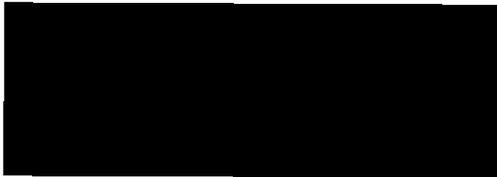


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B9

FILE: [REDACTED]
EAC 10 036 50305

Office: VERMONT SERVICE CENTER

Date: **AUG 13 2010**

IN RE: Petitioner:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks immigrant classification under 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.

The director denied the petition because the record failed to establish that the petitioner had a qualifying relationship with her former husband within two years of filing this petition, as required by statute.

The petitioner, through counsel, submitted 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).

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 Mexico who entered the United States without inspection. On October 12, 2002, the petitioner was served with a Notice to Appear for removal proceedings under section 240 of the Act charging her as subject to removal from the United States pursuant to section 212(a)(6)(A)(i) of the Act as an alien present in the United States without being admitted or paroled. On December 23, 2002, the petitioner married E-M-¹, then a U.S. lawful permanent resident, in California.² On August 5, 2004, E-M- filed a Form I-130, Petition for Alien

¹ Name withheld to protect individual's identity.

² According to records of the Service, E-M- became a naturalized U.S. citizen on September 17,

Relative, on the petitioner's behalf, which was denied on September 11, 2006, due to abandonment. On August 3, 2007, the marriage of the petitioner and E-M- was dissolved by order of the Superior Court of California, County of San Luis Obispo.³ The petitioner remains in proceedings before the Los Angeles, California Immigration Court.

The petitioner filed this Form I-360 on November 19, 2009. The director denied the petition on March 19, 2010, 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, counsel does not contest the fact that the petitioner was divorced from her citizen spouse for more than two years at the time of filing, but states, in part, that he "erred and rendered ineffective assistance," as he "simply overlooked the divorce date in his search for the truth and desire to build as accurate an account as possible." Counsel also states: "The VSC should equitably toll the filing deadline due to ineffective assistance of counsel, because Counsel erred in a manner prejudicial to the client."

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 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). Although counsel states that the delay in filing the petition was his fault, neither counsel nor the petitioner provides any documentary evidence listed above to satisfy the claim of ineffective assistance of counsel. Accordingly, counsel's assertions regarding his failure to file the petition within two years of the petitioner's divorce have no merit.

The statutory language of the two-year, post-divorce filing deadline is clear; it prescribes no exceptions to the filing period and U.S. Citizenship and Immigration Services (USCIS) lacks the authority to waive the deadline as a matter of discretion. The statute explicitly states 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. 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). As previously noted, the petitioner in this case was divorced from her spouse for more than two years at the time of filing the petition. Accordingly, we concur with the director's determination that the petitioner did not establish a qualifying relationship with her former husband.

Counsel also asserts: "The VSC should equitably toll the filing deadline due to ineffective assistance of

2003.

³ Case Number FL07-0133.

counsel, because Counsel erred in a manner prejudicial to the client.” 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. Counsel’s citation to the various court decisions fails to demonstrate that the statute in the instant matter is a statute of limitations. Accordingly, the petitioner is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act and her petition must be denied.

Beyond the director’s decision, the petitioner’s divorce also renders her ineligible for immigrant classification under section 201(b)(2)(A)(i) based on a qualifying relationship with a citizen of the United States, as required pursuant to section 204(a)(1)(A)(iii)(II)(cc). For this additional reason, the petition may not be approved.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.