

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



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



B9

FILE: [REDACTED]
EAC 10 033 50521

Office: VERMONT SERVICE CENTER

Date: **AUG 19 2010**

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: [REDACTED]

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 petition will be denied.

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 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].

On April 9, 2010, the director denied the petition, determining that the petitioner had not established that she had a qualifying relationship with a U.S. citizen spouse.

Counsel for the petitioner submits a Form I-290B, Notice of Appeal or Motion. Counsel asserts that the instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, was filed because a prior filed Form I-360 was denied by United States Citizenship and Immigration Services (USCIS) on April 18, 2007 because USCIS did not receive a response to a Notice of Intent to Deny (NOID) the petition. Counsel asserts that the petitioner had provided the requested documentation to her prior attorney of record but that the attorney did not provide the response to USCIS. Counsel asserts further that the petitioner's prior counsel did not inform her of the denial for about six months after his receipt of the denial. Counsel contends that the AAO should find that the petitioner's prior counsel provided her with ineffective assistance of counsel and avers that current counsel will have the petitioner take the necessary measures to satisfy the requirements of [REDACTED]. In the alternative, counsel contends that an exception to the requirement that a Form I-360 must be filed within two years of the dissolution of the qualifying marriage is warranted for any subsequently filed form I-360 which is based upon the same marriage and abuse. Counsel submits a copy of the April 18, 2007 decision denying the petitioner's previously filed Form I-360. The record does not include further argument or documents in support of the appeal. The record is considered complete.

The record in this matter provides the following pertinent facts and procedural history. The petitioner is a native of Jamaica. She entered the United States on October 13, 1994 as a B-2 visitor with authorization to remain in the United States until April 12, 1995. On March 18, 1997, the petitioner married D-C⁻¹, the claimed abusive United States citizen spouse in the State of New York. On July 20, 2006, the Supreme Court of the State of New York, County of Queens issued a Judgment of Divorce dissolving the marriage. On November 13, 2009, the petitioner filed the instant Form I-360.

Qualifying Relationship

The director determined that the petitioner had not established a qualifying relationship with [REDACTED] as the marriage had been terminated more than two years prior to the petitioner's filing of the Form I-360.

As noted above, counsel for the petitioner asserts that the petitioner's previously filed Form I-360, filed on March 28, 2006, should preserve the petitioner's eligibility to seek benefits under the VAWA statute and regulations. The AAO disagrees. The previously filed Form I-360 was denied on April 18, 2007 and is not considered a placeholder for future filings of Forms I-360. The language of the statute clearly indicates 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. 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 observed, the petitioner in this matter was divorced from her spouse for more than two years at the time of filing the instant petition. Accordingly, we concur with the director's determination that the petitioner did not establish a qualifying relationship with her former spouse.

The AAO has also considered counsel's claim that the petitioner suffered irreparable harm by prior counsel's failure to respond to the NOID. However, counsel also acknowledges that to satisfy a claim that an individual received ineffective assistance of counsel, the individual must satisfy the requirements set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Pursuant to *Lozada*, 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. *Id.* Although counsel states that he will have the petitioner take the necessary steps to satisfy these requirements, the record does not include any evidence that the petitioner has so complied.

¹ Name withheld to protect the individual's identity.

Beyond the director's decision, the present record also fails to establish that the petitioner was eligible for immediate relative classification based on a qualifying relationship with her former spouse, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. The regulation at 8 C.F.R. § 204.2(c)(1)(B) requires that a self-petitioner be eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on his or her relationship to the abusive spouse. Because the petitioner did not establish she had a qualifying relationship as the spouse of a U.S. citizen at the time of filing the instant petition, she is also ineligible for immediate relative classification based on the former marriage.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here that burden has not been met.

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