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



U.S. Citizenship
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Services

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MAR 19 2010

FILE: [Redacted] Office: VERMONT SERVICE CENTER
EAC 06 200 51407

Date:

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:

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion to reconsider will be granted. The AAO's previous decision will be affirmed and 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.

The director denied the petition because the record failed to establish that the petitioner had a qualifying relationship with her former husband. The AAO affirmed the director's decision on appeal. The AAO noted that the petitioner did not contest that she was divorced from her citizen spouse for more than two years at the time of filing but had stated that she was unaware of the requirement to file a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, within two years of a divorce if she could establish a connection between the legal termination of the marriage within the past two years and battering or extreme cruelty by the United States citizen spouse. The petitioner stated that she "was never informed that there was a two-year limit on filing the [Form] I-360, or [she] would have sought more efficient counsel much sooner." The AAO, citing a recently issued binding precedent, *Matter of Compean, Bangaly and J-E-C-*, 24 I&N Dec. 710 (A.G. 2009), set out the requirements an alien must follow to establish that she had experienced ineffective assistance of counsel. The AAO found, pursuant to *Compean*, that claims pending prior to January 7, 2009 need only comply with the requirements set out in a previously decided matter, *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) *aff'd*, 857 F.2d 10 (1st Cir. 1988). The AAO determined that the record of proceeding contained no evidence that the petitioner had met the requirements of *Matter of Lozada* with regard to her claim of ineffective assistance of counsel. The AAO concurred with the director's determination that the petitioner had not established a qualifying relationship with her former husband.

On motion, counsel for the petitioner asserts that both *Compean* and *Matter of Lozada* apply to matters before the Executive Office for Immigration Review (EOIR) and the Board of Immigration Appeals (BIA). Counsel contends that as there are no known or published cases arising from the deficient work of an attorney from United States Citizenship and Immigration Services (USCIS) or the AAO, no authority exists to prompt the petitioner to follow the requirements of *Matter of Lozada* or *Compean*. Counsel also claims that the AAO misapplies the burden of proof language in its decision as burden of proof as set out at section 291 of the Act, 8 U.S.C. § 1361 applies to an alien when procuring or attempting to procure a visa or any document required for entry as it relates to issues of admissibility and inadmissibility.

On June 3, 2009, Attorney General Eric Holder vacated the decision in *Matter of Compean* regarding claims of ineffective assistance of counsel and directed the BIA and immigration judges to apply the decision in *Matter of Lozada* for claims of ineffective assistance of counsel, pending promulgation of relevant regulations. Although the AAO notes counsel's contention that *Matter of Lozada* applies

only to the BIA and EOIR, the AAO observes that BIA published decisions are binding on all officers of USCIS in the administration of the immigration laws of the United States. 8 C.F.R. §§ 103.3(c) and 1003.1(g).

As stated in *Matter of 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. *Matter of Lozada*, 19 I&N Dec. at 639.

Upon review of the facts of this matter, the AAO has considered the petitioner's February 27, 2009 affidavit wherein she declares that she hired her previous counsel "in late May of 2003 to represent [her]in [her]divorce and to file [her] immigration petition following [her] divorce." The remainder of the petitioner's affidavit relates to her difficulties with her former husband's lack of financial support. The petitioner's general statement does not set forth in detail the agreement she had with her prior counsel regarding her immigration petition(s). Neither does the record include evidence that she informed her prior counsel of any allegations leveled against him nor does the record include evidence that she has filed a complaint with the appropriate disciplinary authorities and if not, why not. There is no information in the file providing details of the circumstances of the failure to timely file the Form I-360 petition that leads to the conclusion that the petitioner had a mutual understanding with her prior counsel to file a Form I-360 on her behalf. Rather the petitioner's statements which refer to her student status indicate that the petitioner may have sought assistance to file petitions for immigration benefits other than through a Form I-360 petition. The record does not include the necessary evidence under *Matter of Lozada* establishing that the petitioner did not have effective assistance of counsel.

Regarding the standard of proof, in visa petition proceedings, the AAO finds counsel's assertion disingenuous. The burden as always is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). 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 met that burden of proof. Accordingly, the appeal will be dismissed and the petition will be denied.

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