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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
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **NOV 01 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:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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].

Pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act, an alien who has divorced an abusive United States citizen may still self-petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act if the alien demonstrates that he or she is a person

who was a bona fide spouse of a United States citizen within the past 2 years and –

* * *

(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)(A)(iii) (II)(aa)(CC) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC).

On April 20, 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, a brief, and documentation that had previously been provided.

The record in this matter provides the following pertinent facts and procedural history. The

petitioner is a native and citizen of Mexico. She entered the United States on or about 1989. On April 11, 2001, the petitioner married A-H-¹, the claimed abusive United States citizen spouse in the State of New York. On January 24, 2006, a judgment of divorce was entered terminating the marriage. The instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, was filed on December 17, 2009.

Qualifying Relationship

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

Counsel asserts that the instant Form I-360 was filed because a previously submitted Form I-360 was rejected by United States Citizenship and Immigration Services (USCIS) on May 13, 2004 due to an incorrect fee. Counsel asserts that the petitioner's prior representative did not follow up by re-filing the Form I-360 with the correct fee.² Counsel also contends that in 2007 the petitioner retained the [REDACTED] to assist her with her immigration matters and that the [REDACTED] attempted to file a Form I-360, within the two years following the termination of the petitioner's marriage, but that there is no documentary evidence establishing that the Form I-360 was filed with the Vermont Service Center.³ Counsel asserts that USCIS should accept the petitioner's resubmission and apply the doctrine of equitable tolling. Counsel avers that the petitioner did not willfully fail to re-file her Form I-360 timely and that she did not know of the two year deadline to submit a Form I-360.

The previously submitted Form I-360 was rejected on May 13, 2004 and notice of such rejection was sent to the petitioner's current address at that time. 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.

¹ Name withheld to protect the individual's identity.

² The record does not demonstrate that the petitioner received ineffective assistance of counsel. It is not clear from the record that the preparer who initially attempted to file the Form I-360 in 2004 was authorized to represent her pursuant to 8 C.F.R. § 292. We observe, additionally, that the rejection notice was sent to the petitioner's address of record.

³ The record includes a September 25, 2007 cover letter that references an April 29, 2004 Form I-360, the May 13, 2004 rejection notice, and information that an officer at the New York District Office suggested that the petitioner reapply.

Equitable Tolling

Present counsel does not persuasively establish that the two-year limitation of section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act is subject to equitable tolling and, if so, that the petitioner warrants such equitable action.

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, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); *Weddel v. Sec’y of H.H.S.*, 100 F.3d at 930-32.

The immigration laws contain statutes of limitations that are subject to equitable tolling as well as statutes of repose, which are not. 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 limitations 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 124, 135 (10th Cir. 2002); *Borges v. Gonzalez*, 402 F.3d 398, 406 (3d Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d 488 (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).

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) of the Act is a statute of limitations subject to equitable tolling and counsel presents no claims as to why this portion of the Act is comparable to other immigration statutes that federal circuit courts have found subject to equitable tolling.

Due Diligence

Even if section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act is a statute of limitations subject to equitable tolling, the record does not demonstrate that the petitioner is entitled to such equitable relief. Ineffective assistance of counsel may be a basis for equitably tolling an immigration statute of limitations. *See e.g. Iavorski v. I.N.S.*, 232 F.3d at 134; *Mahmood v. Gonzales*, 427 F.3d 248, 251 (3rd Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d at 490-91; *Lopez v. I.N.S.*, 184 F.3d 1097, 1098 (9th Cir. 1999). However, to warrant equitable tolling, an alien must demonstrate that he or she exercised due diligence in pursuing the case during the period sought to be tolled. *Iavorski v. I.N.S.*, 232 F.3d at 135; *Albillo-De Leon v. Gonzalez*, 410 F.3d at 1099-100. Despite counsel’s assertions, the record contains no evidence that the petitioner exercised due diligence.

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.