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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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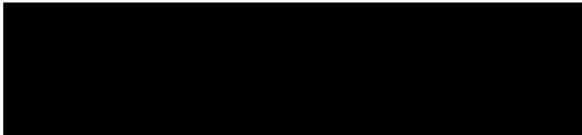


FILE:  Office: VERMONT SERVICE CENTER Date: JAN 10 2011

IN RE: 

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:

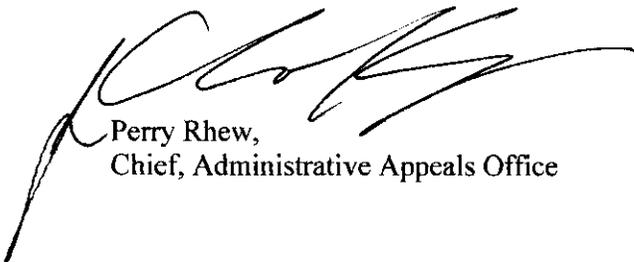


INSTRUCTIONS:

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 \$630. 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 service center director denied the immigrant visa petition and 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 on the basis of his determination that the petitioner had not established her eligibility for immigrant classification based upon a qualifying relationship with a citizen of the United States because she and her former husband divorced more than two years before the petition was filed. The petitioner, through counsel, filed a timely appeal. On appeal, counsel submits a brief reasserting the petitioner's eligibility.

Applicable Law

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)(iii)(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:

- (CC) who was a bona fide spouse of a United States citizen within the past 2 years and –
 - (aaa) whose spouse died within the past 2 years;
 - (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, the following:

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 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.

Pertinent Facts and Procedural History

The petitioner, a citizen of Mexico, married A-A-¹ a citizen of the United States, on December 1, 1998. They divorced in February 2003. The petitioner filed the instant Form I-360 on April 9, 2010. The director issued a subsequent request for additional evidence to which the petitioner, through counsel, submitted a timely response. After considering the evidence of record, including the petitioner's response to his request for additional evidence, the director denied the petition on June 30, 2010.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition.

Qualifying Relationship and Corresponding Eligibility for Immediate Relative Classification

On appeal, counsel does not dispute that the petition was filed more than two years after the petitioner and A-A- divorced. Instead, he argues that we possess the authority to waive the statutory limitation contained in section 204(a) of the Act as it relates to petitioners who are no longer married at the time of the filing of the Form I-360, and that our failure to exercise such discretion would contradict the legislative intent of Congress.

We disagree with counsel's implicit argument that the petition is subject to the doctrine of equitable tolling. As will be set forth below, the two-year, post-divorce filing period of section 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa) of the Act is a statute of repose not subject to equitable tolling, and not a statute of limitations that is subject to equitable tolling.

¹ Name withheld to protect individual's identity.

The doctrine of equitable tolling 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.

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 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 (3d Cir. 2005); *Pervais v. Gonzalez*, 405 F.3d 488, 490 (7th Cir. 2005). We also note 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)² 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).

The two-year, post-death filing period of section 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa) 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. 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). Such is the case with section 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa) of the Act. That subsection created a threshold condition for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Every individual filing a self-petition under section 204(a)(1)(A)(iii) of the Act as an alien battered or subjected to extreme cruelty by a citizen of the United States must establish that he or she has a qualifying relationship with a citizen of the United States. In cases where the alien and the allegedly abusive spouse have divorced, the petition must be filed within two years of the divorce. Otherwise, there is no qualifying relationship. If there is no qualifying

² 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).

relationship, then the alien is not, pursuant to section 204(a)(1)(A)(iii)(I) of the Act, “an alien who is described in subclause (II) [who] may file a petition.”

We also find that section 204(a)(1)(A)(iii)(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. In contrast, when it enacted section 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa) of the Act, Congress afforded the Secretary of Homeland Security no such discretion. Like the statute before the court in *Munoz*, the two-year, post-divorce filing period of section 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa) of the Act identifies a specific cut-off date: two years from the date of the divorce.

Counsel argues on appeal that the AAO possesses the discretion to waive the two-year, post-legal termination filing period of section 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa) of the Act because that statute “is silent regarding a situation like the Petitioner’s wherein her failure to file within the two year timeframe directly resulted from the mental abuse and terror. . .,” and cites *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, as discussed above, the statute is not “silent” on this issue: the filing deadline is clear and is a threshold requirement that applies to all self-petitioners seeking classification under the provisions for abused spouses. Nor do we find counsel’s citation of *United States v. Shimer*, 367 U.S. 374 (1961) compelling. According to counsel, the AAO possesses the discretion pursuant to *Shimer* to “reasonably interpret a statute” unless it appears from the statute or its legislative history that such interpretation would lead to a result that Congress would not have sanctioned. Here, the statute is clear and requires no further interpretation.

Counsel has failed to establish that this section of the Act is a statute of limitations subject to equitable tolling or that the statutory filing deadline may otherwise be waived. Accordingly, we concur with the director’s finding 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.

Conclusion

The petitioner has failed to establish her eligibility for immigrant classification based upon a qualifying relationship with a citizen of the United States because she and A-A- divorced more than two years before the petition was filed. The petitioner, therefore, is ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), and her petition must remain denied.

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 and the appeal will be dismissed.

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ORDER: The appeal is dismissed.