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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
and Immigration
Services

PUBLIC COPY



B9.

DATE:
MAY 23 2011

Office: VERMONT SERVICE CENTER



IN RE:

Petitioner:



PETITION:

Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(B)(ii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

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

The petitioner seeks immigrant classification under section 204(a)(1)(B)(ii) 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 lawful permanent resident.

The director determined that the petitioner had not established that she had a qualifying relationship with a United States lawful permanent resident. Counsel for the petitioner timely submits a Form I-290B, Notice of Appeal or Motion and the petitioner's statement in support of the appeal, as well as previously submitted documentation.

Applicable Law and Regulations

Section 204(a)(1)(B)(ii) 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 the spouse of a lawful permanent resident under section 203(a)(2)(A) of the Act based on his or her relationship to the abusive spouse, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

Section 204(a)(1)(B)(ii)(II)(aa) of the Act states, in pertinent part, that an individual who is no longer married to a lawful permanent resident 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 lawful permanent resident within the past 2 years and –

* * *

(bbb) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the lawful permanent resident spouse;

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) further states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), 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 guidelines for a self-petition under section 204(a)(1)(B)(ii) of the Act are set forth in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

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.

(ii) *Relationship.* A self-petition filed by a spouse must be accompanied by evidence of citizenship of the United States citizen or proof of the immigration status of the lawful permanent resident abuser. It must also be accompanied by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages, if any, of . . . the self-petitioner

Facts and Procedural History

The petitioner is a native and citizen of Poland. She entered the United States on October 24, 1991 on a V-1 visa. She married M-D-¹ the claimed abusive United States lawful permanent resident, on June 6, 1992 in the State of New York. On May 5, 2006 a Judgment of Divorce was issued terminating the marriage between the petitioner and M-D-. On May 16, 2006, the Judgment of Divorce was filed in the County Clerk's Office in King's County, New York. On July 29, 2008, the petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. Upon review of the record, including the petitioner's responses to the requests for evidence issued, the director determined that the petitioner had not established that a qualifying relationship with the claimed abusive United States lawful permanent spouse existed when the petition was filed. Counsel timely submits a Form I-290B, Notice of Appeal or Motion, a brief, and documents in support of the appeal.

Qualifying Relationship

The petitioner has failed to establish that she had a qualifying relationship with a United States lawful permanent resident when the petition was filed on July 29, 2008. The language of the statute clearly states that an alien *who is the spouse of a United States lawful permanent resident* may self-petition for immigrant classification. The language of the statute also clearly provides that to remain eligible for classification despite no longer being married to a United States lawful permanent resident, an alien must have been the bona fide spouse of a United States lawful permanent resident "within the past two years" and demonstrate a connection between the abuse and the legal termination of the marriage. Section 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act. In this matter, the divorce judgment terminating the marriage was filed on May 16, 2006, more than two years subsequent to the divorce. On appeal, counsel asserts that the petitioner's late filing of the Form I-360 should be excused as she was provided ineffective assistance of counsel by her previous attorney. The record includes two affidavits signed by the petitioner, the second one submitted on appeal. In each affidavit, the petitioner declares that she was not aware of the deadline required to file a Form I-360 petition and that her prior counsel did not inform her of the deadline or advise her

¹ Name withheld to protect the individual's identity.

of her eligibility for relief as an abused spouse. She notes that she did not become aware that she could possibly qualify for lawful permanent residence based on her former spouse's abusive behavior until she sought a second opinion regarding her immigration status. She also requests in each affidavit that United States Citizenship and Immigration Services (USCIS) accept her Form I-360 petition on a [REDACTED] basis because of the ineffective assistance of her prior counsel.

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).

Based upon the above criteria, the petitioner has not established that her delay in filing was the result of ineffective assistance of counsel. The petitioner has not presented any detailed testimony concerning the contractual agreements she made with a prior attorney, or any other evidence to establish her prior attorney's ineffective representation. More importantly, even if the petitioner could demonstrate the ineffective assistance of her former counsel, there is no provision that would allow USCIS to waive the two-year limitation of section 204(a)(1)(B)(ii)(II)(aa)(CC) of the Act. The petitioner's marriage to M-D- was legally dissolved and filed as of May 16, 2006 and the Form I-360 was not filed within two years of the termination of the marriage. The record does not establish that the petitioner had a qualifying relationship with a United States lawful permanent resident when the petition was filed.

Immigrant Classification

Beyond the decision of the director, as the petitioner has not established that she has a qualifying relationship with a United States lawful permanent resident, she is also precluded from establishing that she is eligible for classification as the spouse of a lawful permanent resident based on her relationship with M-D-, as required by section 204(a)(1)(B)(ii)(II)(CC) of the Act. The regulation at 8 C.F.R. § 204.2(c)(1)(i)(B) requires that a self-petitioner be eligible for immediate relative classification under section 203(a)(2)(A) of the Act based on his or her relationship to the abusive spouse. In this matter her relationship to the claimed abusive spouse has not been established.

Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons. 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 remains denied.