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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

PUBLIC COPY



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

B9



DATE: **NOV 30 2011** OFFICE: VERMONT SERVICE CENTER

FILE:

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:

SELF-REPRESENTED

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 reaffirmed the denial upon granting the petitioner's four subsequent motions to reopen. 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 his former spouse, a citizen of the United States.

The Vermont Service Center director (the director) denied the petition for failure to establish a qualifying relationship because the petitioner had divorced his former wife more than two years before the petition was filed. On appeal, the petitioner submits a letter and additional evidence.

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).

An individual who is no longer married to a citizen of the United States remains eligible to self-petition under these provisions if he or she "was a bona fide spouse of a United States citizen within the past 2 years and . . . 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).

Section 204(a)(1)(J) of the Act, further prescribes, 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].

See also 8 C.F.R. § 204.2(c)(2)(i) (same).

Pertinent Facts and Procedural History

The petitioner, a citizen of Sao Tome and Principe, entered the United States on February 5, 1999 as a nonimmigrant visitor. On June 22, 2001, the petitioner married R-D-¹ At the time of their marriage,

¹ Name withheld to protect individual's identity.

R-D- was a lawful permanent resident of the United States, but she became a U.S. citizen upon her naturalization on June 18, 2008. The petitioner's marriage to R-D- ended in dissolution on June 6, 2003. The petitioner filed the instant Form I-360 on April 7, 2008, through his prior counsel. The director issued a subsequent request for additional evidence of, among other things, the legal termination of the petitioner's marriage. The petitioner's former counsel timely responded to the director's request with additional evidence, including a copy of the Solano County, California Superior Court's judgment of dissolution of the petitioner's marriage. The director denied the petition because the qualifying marriage ended more than two years before the petition was filed. The petitioner filed three subsequent motions to reopen and one late appeal, which the director considered as a motion to reopen. The director affirmed his denial upon reopening the matter four times.²

On appeal, the petitioner reasserts that two prior attorneys provided him with ineffective assistance of counsel, which prevented him from timely filing his petition. The petitioner claims that this "exceptional circumstance" should rescind the director's denial. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Review of the entire record fails to establish the petitioner's eligibility for the following reasons.

Qualifying Relationship and Corresponding Eligibility for Immediate Relative Classification

The petitioner's marriage to a U.S. citizen was legally terminated on June 6, 2003. The instant petition was filed nearly five years later on April 7, 2008. The petitioner is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act based on his relationship with R-D- because their marriage was dissolved more than two years before this petition was filed.

Beyond the decision of the director, the petitioner has also not established his eligibility for immediate relative classification based on a qualifying relationship with his former wife, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act and pursuant to the regulation at 8 C.F.R. § 204.2(c)(1)(i)(B).³

Ineffective Assistance of Counsel

On appeal, the petitioner asserts that he failed to timely file his petition due to the ineffectiveness of his two prior attorneys. The record does not support his claim.

² The petitioner was subsequently charged with remaining in the United States beyond his period of authorized stay and placed in removal proceedings before the San Francisco Immigration Court. His next hearing is scheduled for December 15, 2011.

³ 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).

An appeal 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 or her 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*, *Matter of Compean*, 25 I&N Dec. 1 (AG 2009).

The Ninth Circuit Court of Appeals, within whose jurisdiction this petition arose, has held that strict adherence to *Lozada* is not required when the record clearly shows the ineffective assistance of counsel. See *Escobar-Grijalva v. I.N.S.*, 206 F.3d 1331, 1335 (9th Cir. 2000) (deportation hearing transcript showed immigration judge's own confusion over alien's representation by counsel and alien equivocally answered immigration judge's question of whether she wanted counsel, whom she had never met before, to represent her); *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 526 (9th Cir. 2000) (record of proceedings documented prior counsel's failure to timely file alien's application for suspension of deportation); *Ontiveros-Lopez v. I.N.S.*, 213 F.3d 1121 (9th Cir. 1999) (record showed that former counsel conceded alien's deportability, sought relief for which the alien was statutorily ineligible and that new counsel could not comply with *Lozada* given his late receipt of the alien's file).

The petitioner has failed to show that his first attorney provided him with ineffective assistance. The record contains a retainer agreement between the petitioner and his first attorney dated March 5, 2003, which shows that the attorney only agreed to do a "preliminary investigation into immigration options" for which the petitioner was charged \$540. The petitioner also submitted correspondence from his first attorney in which she explained that after conducting the preliminary investigation, she determined that he probably would not be successful in obtaining lawful permanent residency as a victim of spousal abuse and suggested that he get a second opinion from another immigration attorney. As the petitioner's first attorney never agreed and was never retained to file a Form I-360 self-petition on his behalf, she did not engage in any ineffective assistance related to the instant petition, which was filed over five years later by the petitioner's second attorney. On appeal, the petitioner claims that his first attorney failed to advise him of the two-year, post-divorce filing limitation. However, at the time he retained his first attorney, the petitioner's marriage had not been legally terminated. Accordingly, any failure to advise the petitioner of the post-divorce deadline did not constitute ineffective assistance.

In regards to his second attorney who filed this Form I-360, the petitioner has met the *Lozada* requirements. However, no legal basis exists to waive or toll the two-year post-divorce filing. Although courts have found certain filing deadlines to be statutes of limitations subject to equitable tolling in the context of removal or deportation, the petitioner cites no case finding visa petition filing deadlines subject to equitable tolling. Compare *Albillo-DeLeon v. Gonzalez*, 410 F.3d 1090, 1098 (9th Cir. 2005) (time limit for filing motions to reopen under NACARA is a statute of limitations subject to equitable tolling) with *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1048-50 (9th Cir. 2008)

(deadline for filing a visa petition to qualify under section 245(i) of the Act is a statute of repose not subject to equitable tolling).

The two-year, post-divorce filing period of section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act is a statute of repose not subject to equitable tolling, and the AAO lacks the authority to waive the statutory deadline.⁴

Conclusion

The petitioner has failed to overcome the director's decision on appeal. He has not established a qualifying relationship with his former wife and has not demonstrated his corresponding eligibility for immediate relative classification based on such a relationship. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and this petition must remain denied.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met and the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁴ Even if the deadline were found to be a statute of limitations, the petitioner would still have to show that he exercised due diligence in pursuit of his claim. *See Albillo-DeLeon v. Gonzalez*, 410 F.3d at 1100.