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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



By

Date: **FEB 28 2012**

Office: VERMONT SERVICE CENTER File: 

IN RE: 

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:

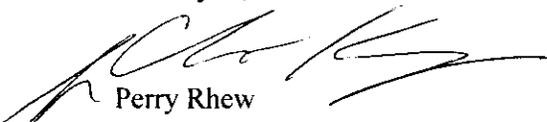


INSTRUCTIONS:

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 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 Vermont Service Center Director denied the immigrant visa petition (Form I-360) 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)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by a lawful permanent resident spouse.

The director denied the petition because the petitioner filed the Form I-360 more than two years after the termination of her marriage. On appeal, counsel submits a brief, general information from the U.S. postal office and copies of documentation already in the record.

Applicable Law and Regulations

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a lawful permanent resident 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 203(a)(2)(A) of the Act as the spouse of a lawful permanent resident, 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).

An alien who has divorced an abusive lawful permanent resident may still self-petition under this provision of the Act if the alien 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)(B)(ii)(II)(aa)(CC)(bbb) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(aa)(CC)(bbb).

Facts and Procedural History

The petitioner is a citizen of Mexico who entered the United States without inspection on December 14, 1992. [REDACTED] married a lawful permanent resident. [REDACTED] marriage was dissolved by order of the Pinellas County, Florida, Circuit Court. The petitioner filed the instant Form I-360 on December 22, 2008. The director denied the Form I-360 because the petitioner failed to establish a qualifying relationship and corresponding eligibility for preference immigrant classification.

On appeal, counsel asserts that the evidence submitted below and on appeal demonstrates that the petitioner filed the Form I-360 within two years of the dissolution of her marriage. The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record fails to demonstrate the petitioner's eligibility for the following reasons.

Qualifying Relationship

The petitioner has failed to demonstrate the existence of a qualifying relationship and her corresponding eligibility for preference immigrant classification on the basis of such a relationship because the petitioner terminated the marriage more than two years prior to filing the Form I-360.

As noted, the petitioner's divorce took legal effect on December 15, 2006, and she did not file the instant petition until December 22, 2008, more than two years later. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act based on her relationship with her lawful permanent resident spouse because she was not his bona fide spouse within two years of the date she filed this petition.

On appeal, counsel disputes that the petition was filed more than two years after the petitioner was divorced. Counsel states that the petitioner mailed the Form I-360 by U.S. Priority Mail on December 11, 2008, and that the postal service guarantees delivery of such packages within two to three days. Counsel contends that, even though he is unable to provide an exact date of delivery, the preponderance of the evidence suggests that the Vermont Service Center should have received the petition at the very latest on December 14, 2008, within the two year filing period requirement. First, counsel fails to provide evidence to establish that the petition was mailed on the date on which he claims it was filed. Second, the record shows that the Vermont Service Center received the petition on December 22, 2008. Third, the petition was filed concurrently with an Application to Register Permanent Residence or Adjust Status (Form I-485) which included filing fees which were not issued until December 16, 2008 and clearly reflect that counsel could not have mailed the petition prior to the passing of the two-year deadline.¹

Alternatively, counsel contends that the two-year post-divorce filing deadline is a statute of limitations subject to equitable tolling. Counsel cites no binding legal authority for his claim.² 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 federal circuit court case finding visa petition filing deadlines to be 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 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)(B)(ii)(II)(CC)(bbb) of the Act is a statute of repose not subject to equitable tolling, and we lack the authority to waive the statutory deadline.

As set forth above, the petitioner has failed to demonstrate the existence of a qualifying relationship with a lawful permanent resident and her corresponding eligibility for preference immigrant classification, as required by subsections 204(a)(1)(B)(ii)(II)(aa) and (cc) of the Act.

¹ [REDACTED] issued from counsel's account and dated December 16, 2008.

² Counsel cites *Moreno-Gutierrez v. Napolitano*, 2011 WL 2518897 (June 24, 2011, D.Colo.), which is not binding on this petition because it arose outside of the jurisdiction of the U.S. District Court of Colorado.

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Conclusion

In these proceedings, the petitioner bears the burden of proof to establish her eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). Here, that burden has not been met. Accordingly, the appeal will be dismissed and the petition will remain denied.

ORDER: The appeal is dismissed.