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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



B9

DATE: **MAR 30 2012**

Office: VERMONT SERVICE CENTER

File: 

IN RE:

Petitioner: 

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:

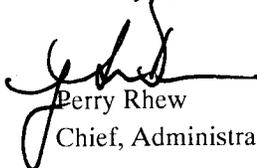


INSTRUCTIONS:

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 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 remain 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.

The director denied the petition, after determining that the petitioner had not established she had a qualifying relationship with a United States citizen (USC) or that she is eligible for immediate relative classification based on a qualifying relationship.

Applicable Law and Regulations

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a USC may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the USC 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 petitioner’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 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)(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].

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 Latvia. She entered the United States on or about October 30, 2000 on a J-1 visa with authorization to remain in the United States until October 29, 2001. She married J-S-¹, the claimed abusive USC spouse on July 26, 2005 in the State of New York. A Judgment of Divorce terminating the marriage was rendered on September 17, 2008 and filed in Suffolk County, New York on October 3, 2008. On October 19, 2010, the petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. Upon review of the record, the director determined that the petitioner had not established a qualifying relationship with the claimed abusive spouse when the petition was filed and had not established eligibility for immediate relative classification based on the relationship. Counsel for the petitioner timely submits a Form I-290B, Notice of Appeal or Motion, a brief, and additional documentation.

Qualifying Relationship

Upon review, the petitioner has not established she had a qualifying relationship with a United States citizen when the petition was filed on October 19, 2010. The language of the statute clearly states that an alien *who is the spouse of a United States citizen* 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 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,. In this matter, the record shows that the petitioner was no longer married to the claimed abusive spouse when the petition was filed and that the petitioner did not file the Form I-360 within two years of the dissolution of the marriage.

Counsel asserts on appeal that the instant I-360 would have been received at the Vermont Service Center on October 4, 2010 had Federal Express not made an error by shipping it to France, which caused the petition to be received by the Vermont Service Center on October 19, 2010. According to counsel: the petitioner “had up to and including October 4, 2010, the next business day following the two (2) year period in which the appellant might file her I-360 petition.” Counsel implies that the regulation at 8 C.F.R. § 1.1(h) applies to the matter at hand. The regulation at 8 C.F.R. § 1.1(h) states:

The term "day" when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday. (Emphasis added).

¹ Name withheld to protect the individual's identity.

The regulation at 8 C.F.R. § 1.1(h) that counsel relies upon to establish that the Form I-360 would have been timely filed had it been received at the Vermont Service Center on October 4, 2010 applies only to filing deadlines as described in Title 8 of the Code of Federal Regulations, such as a deadline for filing an appeal under 8 C.F.R. § 103.3, a motion under 8 C.F.R. § 103.5, or an asylum application under 8 C.F.R. § 208.2. Accordingly, even if the instant Form I-360 had been received by the Vermont Service Center on October 4, 2010, it would not have been timely filed because the petitioner had only until October 3, 2010 to file her I-360 petition.

Counsel also argues on appeal that the two-year post-divorce filing deadline is a statute of limitations subject to equitable tolling and cites *Jobe v. INS*, 238 F.3d 96 (1st Circuit 2001) in support of his claims. Although courts have found certain filing deadlines to be statutes of limitations subject to equitable tolling in the context of removal or deportation, counsel 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 we lack the authority to waive the statutory deadline.^[1] The petitioner has not established a qualifying relationship with the claimed abusive USC when she filed the Form I-360.

Immigrant Classification

As the petitioner has not established that she has a qualifying relationship with a United States citizen, she is also precluded from establishing that she is eligible for immediate relative classification based on her relationship with the former USC 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. In this matter her relationship to the claimed abusive spouse has not been established.

Conclusion

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.

ORDER: The appeal is dismissed. The petition remains denied.

^[1] Even if the deadline were found to be a statute of limitations, the petitioner would still have to show that she exercised due diligence in pursuit of her claim. See *Albillo-DeLeon v. Gonzalez*, 410 F.3d at 1100.