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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

Date:

APR 08 2013

Office: VERMONT SERVICE CENTER

FILE:

IN RE:

Self-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)

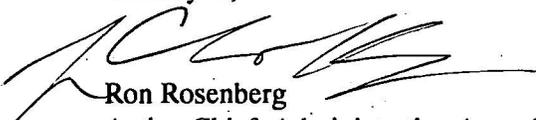
ON BEHALF OF PETITIONER:

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 AAO inappropriately applied the law 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 in accordance with the instructions on Form I-290B, Notice of Appeal or motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and 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 on the basis of his determination that the petitioner had failed to establish a qualifying relationship with a citizen of the United States. The director also noted that the petitioner did not establish that she was living in the United, that she had resided with her husband, that she had been battered or subject to extreme cruelty by her husband, or that she entered into the qualifying relationship in good faith. On appeal, counsel submits a brief and copies of previously submitted 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 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). Except for certain spouses living abroad, an alien is required to be residing in the United States when filing a self-petition under section 204(a)(1)(A)(iii) of the Act. See section 204(a)(1)(A)(v) and (a)(1)(B)(iv) of the Act, 8 U.S.C. § 1154(a)(1)(A)(v) and (a)(1)(B)(iv). An alien who is no longer married to the abusive United States citizen 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 United States citizen spouse." Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

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 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 eligibility requirements are explained further at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part, the following:

- (i) *Basic eligibility requirements.* A spouse may file a self-petition under section 204(a)(1)(A)(iii) . . . of the Act for his or her classification as an immediate relative . . . if he or she:

* * *

- (B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) . . . of the Act based on that relationship [to the U.S. citizen spouse]. . . .

* * *

- (v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.

- (vi) *Battery or extreme cruelty.* For the purpose of this chapter, the phrase “was battered by or was the subject of extreme cruelty” includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner’s marriage to the abuser.

* * *

- (ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explicated 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.

* * *

(iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

* * *

(iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

* * *

(vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

Facts and Procedural History

The petitioner is a native and citizen of India. The petitioner married a U.S. citizen on March 6, 2005 in India. After she came to the United States, she was unable to locate her husband, and eventually discovered that he had annulled their marriage on April 2, 2007. On October 1, 2008, she was granted conditional permanent residence for one year, but the San Bernardino, California field office terminated her conditional resident status on May 4, 2009. The petitioner filed the instant Form I-360 on June 17, 2011. The director denied the petition and counsel timely appealed.¹

On appeal, counsel contends that the two-year filing deadline should be equitably tolled because although the annulment of the petitioner's marriage occurred more than two years before she filed

¹ The petitioner's prior Form I-360 (Receipt No. [REDACTED] was denied on June 17, 2010 and the AAO dismissed her appeal on November 23, 2010.

the petition, she was uninvolved and unaware of the annulment.

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 establish the petitioner's eligibility. Counsel's assertions on appeal do not overcome the director's determinations and the appeal will be dismissed for the following reasons.

Analysis

Qualifying Relationship

As indicated, the instant petition was filed more than two years after the petitioner's husband had their marriage annulled. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act based on her relationship with her husband.

Counsel argues on appeal that the two-year post-termination filing deadline is a statute of limitations subject to equitable tolling. However, he cites no binding authority in support of his argument. Although counsel cites *Moreno-Gutierrez v. Napolitano*, 794 F.Supp.2d 1207 (D. Colo. 2011), that decision is not precedential, as the AAO is not bound to follow the published decision of United States district courts, even in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). 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 binding 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-termination 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 this statutory deadline.²

While the record supports counsel's assertion that the petitioner's marriage was annulled without her knowledge or consent, counsel has submitted no evidence that the New York Supreme Court 2007 order of annulment has been withdrawn or modified. Consequently, she failed to file the petition within two years of the legal termination of her marriage to her husband, and she has not demonstrated the qualifying relationship and corresponding eligibility for immediate relative classification, as required by subsections 204(a)(1)(A)(iii)(II)(aa) and (cc) of the Act.

² Even if the deadline were found to be a statute of limitations subject to equitable tolling, the petitioner would still have to show that she exercised due diligence in pursuit of her claim. See *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Albillo-DeLeon v. Gonzalez*, 410 F.3d at 1100. Counsel argues on appeal that the two-year post-termination filing deadline should be tolled because the petitioner was unaware the marriage had ended and she exercised due diligence in consulting an immigration attorney and filing a Form I-360 petition. Because the two-year filing deadline is not subject to equitable tolling, we do not reach this issue on appeal.

Residence in the United States

The petitioner has shown that she was residing in the United States at the time the petition was filed. The petitioner previously submitted her Washington State driver's license issued in April 2010, a police clearance letter listing her address in Washington and dated April 20, 2011, as well as a T Mobile telephone account statement dated August 10, 2010 and showing calls made in the United States. The director's determination that the petitioner failed to establish residence in the United States will be withdrawn.

Joint Residence

The director did not provide a full analysis of the petitioner's failure to establish joint residence with her former spouse. The record demonstrates that the petitioner resided with her former husband in India. On the Form I-360, the petitioner stated that she lived with her husband from March 2005 until April 2005, and their last joint address was in Amritsar, Punjab, India. The petitioner provided evidence including letters from her landlord and her mother, who both visited the former couple at their residence and provided probative descriptions thereof, as well as bills addressed to both the petitioner and her former husband at their joint address. Accordingly, the record establishes that the petitioner resided with her former husband during their marriage, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act and the director's contrary determination will be withdrawn.

Entry into the Marriage in Good Faith

The director determined that the petitioner's evidence was insufficient to support a finding of her good-faith entry into the marriage, but he did not discuss the basis for his decision. In her response to the RFE, the petitioner submitted an affidavit in which she explained in detail how she first met her former husband. The petitioner provided a probative account of their initial conversations and subsequent period of courtship. The petitioner also discussed in probative detail her feelings for her former husband. The petitioner submitted two affidavits from her mother and her former landlord who both stated that the petitioner and her former husband were married and that they visited the couple at their home. The petitioner also submitted two affidavits from her sisters, [REDACTED] and [REDACTED] both state that they were at the petitioner's wedding and described meeting the petitioner's former husband on a few occasions.

De novo review of the record establishes that the petitioner married her former spouse in good faith. When viewed in the totality, the preponderance of the relevant evidence demonstrates that the petitioner entered into marriage with her former husband in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act. The director's contrary determination shall be withdrawn.

Battery and Extreme Cruelty

The director concluded that the petitioner did not demonstrate that she was abused by her former husband, but the director did not state the basis for his determination. The relevant evidence submitted below demonstrates that the petitioner was subjected to battery by her former husband. In an undated declaration submitted with her initial Form I-360 and in her declaration dated June 8, 2011, the petitioner recounted how her husband physically and sexually abused her. The petitioner also submitted an affidavit from her mother who described visiting her daughter after she was “severely beaten” by her former husband. The petitioner’s landlord also noted in her affidavit that on one occasion the petitioner’s former husband hit the petitioner and the landlord had to intervene to separate them. In a psychological evaluation, the psychologist described how the petitioner’s husband slapped her, punched her, and forced her to have sex with him.

Upon a full review of all the relevant evidence, the petitioner has overcome the director’s determination that she was not subjected to battery. The petitioner’s own description of the physical abuse is consistent and credible. The petitioner also submitted multiple declarations and affidavits from her mother and former landlord that credibly describe incidents of battery the petitioner’s ex-husband committed against her. The psychological evaluation probatively discussed the abuse and its detrimental effects on the petitioner’s mental health. The record contains no material discrepancies or inconsistencies in the petitioner’s claims of physical abuse and the preponderance of the evidence demonstrates that the petitioner’s former husband subjected her to battery during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act. The director’s contrary determination shall be withdrawn.

Conclusion

On appeal, the petitioner has established that she: was residing in the United States when she filed her Form I-360, resided with her former husband, entered into marriage with her ex-husband in good faith, and that her former husband subjected her to battery during their marriage, and the director’s determinations to the contrary will be withdrawn. However, the petitioner has not demonstrated that she had a qualifying relationship to a U.S. citizen and that she is eligible for immediate relative classification based on such a relationship because her petition was filed more than two years after her marriage was annulled. She is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

In these 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; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.