



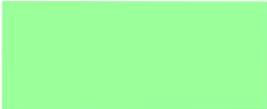
U.S. Citizenship
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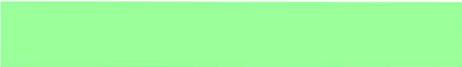


Date: **APR 23 2014**

Office: VERMONT SERVICE CENTER File:

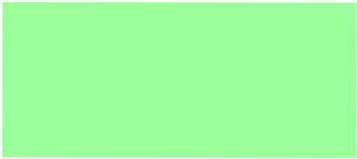


IN RE: Petitioner:



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Vermont Service Center director (“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.

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 a United States citizen.

The director denied the petition, concluding that the petitioner had failed to establish a qualifying relationship with his former spouse, and eligibility for classification as a spouse of a United States citizen.

Relevant Law and Regulations

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 is an alien: “who 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) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa).

Section 204(a)(1)(J) of the Act, states, in pertinent part, the following:

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 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].

The evidentiary standard and guidelines for a self-petition filed under section 204(a)(1)(A)(iii) of the Act are explained further at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part, the following:

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.

Pertinent Facts and Procedural History

The petitioner is a citizen of Mexico who married S-G¹, a United States citizen, on February 18, 2006. They divorced on March 11, 2011. On October 2, 2012, the petitioner filed a Form I-360 petition. On February 7, 2013, the director issued a Notice of Intent to Deny (NOID) requesting evidence of the petitioner's good moral character. On June 6, 2013, the director summarily denied the Form I-360 as abandoned pursuant to 8 C.F.R. § 103.2(b)(13). On April 29, 2013, the petitioner filed the instant Form I-360. The director denied the Form I-360 for failure to establish the required qualifying relationship for a self-petition as a battered spouse, and eligibility for immigrant classification based on that qualifying relationship. The petitioner filed a timely appeal. Even though counsel on appeal states that a brief and additional evidence would be filed within 30 days, counsel has not submitted a brief or additional evidence on appeal.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Qualifying Relationship and Corresponding Eligibility for Immediate Relative Classification

In the appeal notice, counsel contends that the petitioner has the requisite qualifying spousal relationship as the former spouse of a citizen of the United States and is eligible for preference immigrant classification under 204(a)(1)(A)(iii) of the Act based on his former marriage to a citizen of the United States. Counsel asserts that the petitioner filed the initial Form I-360 within two years of his divorce, as required by section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act. Counsel declares that the petitioner should be credited with filing the instant petition within the two-year deadline for divorced self-petitioners. Counsel states that at the time the NOID was issued to the petitioner's attorneys, the petitioner was taken into immigration custody. Counsel declares that only the U.S. Department of Homeland Security (USDHS) knew where the petitioner was detained. Counsel asserts that the petitioner's attorneys were not able to locate the petitioner, and therefore could not provide a response to the NOID. Counsel states that the petitioner refiled the Form I-360 before the director adjudicated

¹ Name withheld to protect the individual's identity.

the previously filed self-petition. Counsel states that the petitioner refiled the Form I-360 petition only because the petitioner was not able to provide a response to the NOID. Counsel argues that because the petitioner refiled the Form I-360 before the director adjudicated the initial self-petition, the newly filed Form I-360 should be given the priority date of the previously filed Form I-360. The statute requires divorced self-petitioners to file within two years of the termination of their marriage. An alien who has divorced an abusive U.S. citizen spouse may still file a self-petition if he or she demonstrates that the divorce from the abusive U.S. citizen was connected to the battering or extreme mental cruelty, and the alien files the self-petition within two years of the divorce. 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) of the Act. The record reflects the filing of two separate Forms I-360. Each Form I-360 self-petition is a separate adjudication. The petitioner filed the new Form I-360 more than one month after his divorce. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). The filing date of the previously filed Form 360 is not relevant to whether the petitioner meets the statutory requirements of section 204 of the Act at the time of filing the new Form I-360 self-petition. Counsel has not identified a legal basis in support of the claim that the newly filed Form I-360 should be given the filing date of the previously filed self-petition.

Counsel argues that the two-year deadline for divorced self-petitioners should be equitably tolled in this case. Counsel contends that the refiling of the Form I-360 self-petition was solely because USDHS failed to notify the petitioner's attorneys that the petitioner was in immigration custody. Counsel contends that Congress intended to provide an opportunity for divorced self-petitioners who have been abused to file Form I-360 petitions and a decision not to equitably toll the filing deadline would be contrary to that intent. H.R.Rep. No. 103-395, at 25. The plain language of the statute requires divorced self-petitioners to file within two years of the termination of their marriage. 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 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-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 this statutory deadline. 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 Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Albillo-DeLeon v. Gonzalez*, 410 F.3d at 1100. Counsel makes no argument and provides no evidence regarding the petitioner's due diligence in this matter. Counsel fails to show that this section of the Act is a statute of limitations that is subject to equitable tolling and that the petitioner exercised the due diligence meriting equitable action.

Counsel asserts that the director erred by not issuing a Request for Evidence (RFE) or NOID the Form I-360 self-petition. The former regulation at 8 C.F.R. § 204.2(c)(3)(ii) (2006) provided that a NOID was required before the denial of a Form I-360 self-petition. However, that regulation applies only to a Form I-360 self-petition filed before June 2007. As the instant Form I-360 was filed on April

29, 2013, under current regulations the director was not required to issue a RFE or NOID in this case.

Conclusion

The petitioner has failed to demonstrate the requisite qualifying spousal relationship, and eligibility for immigrant classification based on that relationship, as required by subsections 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and (cc) of the Act.

In these proceedings, the petitioner bears the burden of proof to establish his eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.