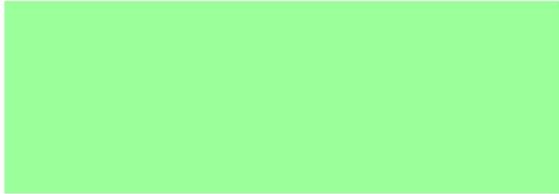
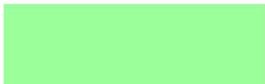




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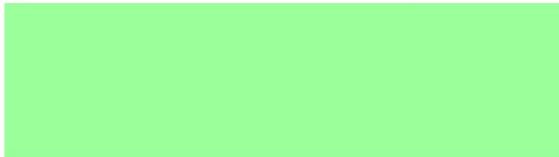


Date: **DEC 10 2014** Office: VERMONT SERVICE CENTER File: 

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 (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 Acting Director, Vermont Service Center (“acting director”), denied the immigrant visa petition and a subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 her former U.S. citizen spouse.

On May 20, 1999, the Director, Vermont Service Center, denied the self-petition for failure to establish eligibility for immigrant classification based on a qualifying spousal relationship and the petitioner’s good moral character. On April 3, 2014, the acting director dismissed the petitioner’s motion to reopen and reconsider as untimely filed. The instant appeal followed.

Pertinent Facts and Procedural History

The petitioner is a citizen of Mexico who has been married three times. The petitioner first married R-V,¹ a Mexican citizen, on July [REDACTED]. The petitioner claimed the marriage ended in divorce on September [REDACTED]. The petitioner subsequently married T-C,² a U.S. citizen, on December [REDACTED] Texas. The petitioner filed the instant Form I-360 self-petition on November 2, 1998, based on her marriage to T-C-. The director issued a Request for Evidence (RFE) and the petitioner, through counsel, responded to the RFE with additional evidence. While the self-petition was pending, the petitioner departed the United States and returned to Mexico where she lived for several years. The director denied the self-petition on May 20, 1999, and the petitioner and T-C- divorced on July [REDACTED]. The petitioner last re-entered the United States on July 27, 2005, as a nonimmigrant visitor. She married J-B,³ a U.S. citizen, on December [REDACTED] Texas. J-B- filed a Form I-130, Petition for Alien Relative, on the petitioner’s behalf which was denied on May 24, 2011, after USCIS concluded the marriage was a “sham” marriage, entered into for the primary purpose of circumventing U.S. immigration laws to obtain an immigration benefit. Counsel contends in his brief that this marriage has also ended in divorce.

On August 20, 2013, more than fourteen years after the director’s denial of the I-360 self-petition, the petitioner, through counsel, filed a motion to reopen and reconsider. Counsel contended, among other things, the petitioner could not timely file her motion because she returned to Mexico and could not have established that she would have suffered extreme hardship upon returning to Mexico which was, at that time, a required element for relief. Counsel also contended that the petitioner’s remarriage after the filing of the Form I-360 should not preclude relief. In dismissing the petitioner’s motion to reopen and reconsider as untimely filed, the acting director concluded that “[t]he delay in filing was not found to be reasonable and beyond [the petitioner’s] control.” The instant appeal followed.

¹ Name withheld to protect the individual’s identity.

² Name withheld to protect the individual’s identity.

³ Name withheld to protect the individual’s identity.

On appeal, counsel contends that the acting director abused her discretion in denying the motion and reasserts arguments made on motion before the acting director. We conduct appellate review on a *de novo* basis. Counsel's claims on appeal do not overcome the acting director's ground for dismissal of the motions and the appeal will be dismissed.

Relevant Law and Regulations

In this proceeding, we will only consider arguments and evidence relating to the grounds underlying the acting director's most recent decision. The petitioner bears the burden of establishing that the acting director's dismissal of the motion to reopen and reconsider was itself in error. If the petitioner can demonstrate that the acting director erred by dismissing the motions, then there would be cause to reopen the proceeding and review the petition anew.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states, in pertinent part:

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

The plain language of the regulation indicates that United States Citizenship and Immigration Services (USCIS) has no discretion in excusing an untimely motion to reconsider. Therefore, the acting director correctly dismissed the motion to reconsider as untimely. As will be further discussed below with respect to the motion to reopen, the acting director correctly found that the delay in filing was not reasonable or beyond the petitioner's control.

In this case, the director denied the self-petition on May 20, 1999. According to her affidavit, dated April 3, 2013, the petitioner herself stated that even though she spent the next few years in Mexico, she continued to visit her sister, [REDACTED] in the United States and worked while in the country. Therefore, we do not find counsel's contention that the petitioner was unable to timely file her motion because she had fled to Mexico to escape her husband to be persuasive. In addition, her last entry into the United States was in July 2005; however, the motion to reopen was not filed until August 2013, more than eight years later. The petitioner does not claim to have made any attempts to contact her prior attorney or to continue pursuing her self-petition and does not assert that doing so was beyond her control. *Cf. Iavorski v. INS*, 232 F.3d 124, 134 (2nd Cir. 2000) (affirming the Board of Immigration Appeal's (BIA) denial of a motion to reopen as untimely because the petitioner failed to exercise due diligence in pursuing his immigration case); *Cekic v. INS*, 435 F.3d 167, 171 (2nd Cir. 2006) (same).

Moreover, although counsel also contends that the petitioner could not have timely filed her motion because she would not have been eligible for relief at that time, counsel concedes in his motion and on appeal that the petitioner would not have been able to establish extreme hardship upon returning to Mexico, a required element for relief at the time. Counsel is, therefore, requesting that the

petitioner's case be reopened because she can now, fourteen years later, establish a prima facie case for relief. A petitioner must establish eligibility for the benefit at filing and continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1),(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). Cf. 8 C.F.R. 103.5(a)(3)(a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision). Therefore, the petitioner cannot file an untimely motion to reopen in an attempt to establish a prima facie case for relief when she concedes she could not have established it before.

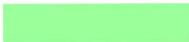
To the extent counsel contends that the acting director erred in failing to specifically address the petitioner's arguments on motion, the acting director specifically found that the delay in filing was not reasonable or beyond the petitioner's control. The regulations do not require the acting director to further explain its reasons or provide additional analysis. Cf. *Lasprilla v. Ashcroft*, 365 F.3d 98, 100 (1st Cir. 2004) ("We have found nothing in the regulations that requires the BIA to explain its reasons when deciding a motion to reconsider"); *Wang v. Board of Immigration Appeals*, 437 F.3d 270, 275 (2nd Cir. 2006) (stating that the BIA does not need to "expressly parse or refute on the record' each individual argument or piece of evidence offered by the petitioner"). Accordingly, the petitioner has failed to establish that the acting director's dismissal of the petitioner's motion was in error.

Even if the director were to have approved the motion and reached the merits of the underlying denial of the I-360, the self-petition would nonetheless be denied because approval of the instant petition is barred pursuant to section 204(c) of the Act. The record shows that in December of 2010, the petitioner married a U.S. citizen, J-B-, who filed a Form I-130 relative petition on the petitioner's behalf. The record further shows that J-B- is the petitioner's sister, [REDACTED] ex-husband, that he admitted to marrying the petitioner as a favor, and that he and [REDACTED] continued to live together.⁴ The Form I-130 relative petition was denied with a specific finding that the couple entered into a "sham" marriage for the primary purpose of circumventing U.S. immigration laws to obtain an immigration benefit. Neither counsel nor the petitioner has acknowledged or addressed this finding.

Conclusion

On appeal, the petitioner has not established that the acting director abused her discretion in finding that the motion to reopen and reconsider was untimely. The petitioner has also not established that the delay in filing the motion to reopen was reasonable or beyond her control. Therefore, the motions were properly dismissed. The petitioner remains ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

⁴ The record also shows that J-B- was the individual who translated the divorce decree from the petitioner's first husband, R-V-, the decree that was at issue in the director's May 20, 1999 decision denying the self-petition.



In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met and the appeal will be dismissed.

ORDER: The appeal is dismissed.