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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: **DEC 23 2014** Office: VERMONT SERVICE CENTER

File: [REDACTED]

IN RE: Petitioner: [REDACTED]

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Acting Director of the Vermont Service Center (the 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 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 his former U.S. citizen spouse.

The director denied the petition for failure to establish that the petitioner had a qualifying relationship with his former spouse, and his corresponding ineligibility for immediate relative classification. The director noted further that the petitioner did not submit sufficient evidence to establish the he was battered or subjected to extreme cruelty perpetrated by his former spouse. On appeal, the petitioner submits a brief.

Relevant Law and Regulations

Section 204(a)(1)(A)(iii)(I) 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 alien who has divorced a United States citizen may still self-petition under section 204(a)(1)(A)(iii) 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, 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.

Facts and Procedural History

The petitioner is a native and citizen of Haiti who was admitted into the United States on February 24, 2010 pursuant to a K-1 nonimmigrant visa. The petitioner married M-F-¹, a U.S. citizen, in New York on January [REDACTED]. Their marriage was dissolved by order of the Supreme Court of New York County in New York on October [REDACTED]. The petitioner filed this Form I-360 on November 14, 2012. The director denied the petition on July 19, 2013, finding that the petitioner did not establish that he had a qualifying relationship with his former spouse due to the dissolution of their marriage over two years before the petition was filed.

On appeal the petitioner does not contest the finding that he was divorced from his citizen spouse for more than two years when he filed his Form I-360 petition. He indicates, however, that he was unaware of the two-year filing requirement; hardships resulting from Hurricane Sandy in October and November 2012, prevented him from filing his Form I-360 petition within two years of his divorce; and the two-year filing requirement should be equitably tolled in his case.

Qualifying Relationship and Eligibility for Immediate Relative Classification

We conduct *de novo* appellate review. Upon review, the petitioner has failed to overcome the grounds for denial and the appeal will be dismissed for the following reasons.

¹ Name withheld to protect individual's identity.

The petitioner provides no legal basis to corroborate assertions that the two-year filing requirement set forth in section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act may be equitably tolled.² Section 204(a)(1) of the Act allows a former spouse to file a self-petition for up to two years of legal termination of the marriage and there is no exception to this rule. 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 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 language of the statute clearly reflects that to remain eligible for immigrant 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.” Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act.

Here, it is uncontested that the petitioner was divorced from his spouse for more than two years when he filed his Form I-360 petition. A divorce must be valid under the laws of the jurisdiction granting the divorce. *See Matter of Hann*, 18 I&N Dec. 196 (BIA 1982). Where a New York judge grants a judgment of divorce and there are no outstanding issues to be resolved, the entry of judgment by the clerk is a mere ministerial act. *See Flythe v. Astrue*, 10 CIV. 9069 (NM), 2012 WL 38927 at *1, *2 (S.D.N.Y. 2012); *See also Application of Avery*, 445 N.Y.S.2d 672, 676 (N.Y. Sur. 1981)(marriage between the petitioner and decedent was not void because the marriage occurred prior to the entry of the judgment of divorce and entry of the decree of divorce was a ministerial act). In the present matter, the petitioner’s divorce was final on October [REDACTED] the date the judgment for divorce was signed. Accordingly, the petitioner did not establish a qualifying relationship with his U.S. citizen spouse and his eligibility for immediate relative classification based on that relationship. The petitioner is therefore not eligible for immigrant classification under section 201(b)(2)(A)(i) of the Act.³

Conclusion

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); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

ORDER: The appeal is dismissed.

² The petitioner also submits no evidence to corroborate assertions that he suffered hardships related to Hurricane Sandy.

³ Although the director also noted in the denial decision that the petitioner did not submit sufficient evidence to establish the he was battered or subjected to extreme cruelty perpetrated by his former spouse, the issue was not analyzed because the director found the petition to be otherwise deniable. We also, will not address this aspect of the petitioner’s claim as he failed to establish the requisite spousal relationship.