U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 17602346

Date: APR. 4, 2022

Appeal of Vermont Service Center Decision

Form I-360, Petition for Abused Spouse or Child of U.S. Citizen

The Petitioner seeks immigrant classification as an abused spouse of a U.S. citizen under the Violence Against Women Act (VAWA) provisions codified at section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii). The Director of the Vermont Service Center denied the Form I-360, Petition for Abused Spouse or Child of U.S. Citizen (VAWA petition), concluding that because the Petitioner and her spouse divorced more than two years prior to the filing of her VAWA petition, she did not establish a qualifying relationship with a U.S. citizen or corresponding eligibility for immigrant classification. The Director also dismissed a subsequent motion to reopen and reconsider. The matter is now before us on appeal. Upon *de novo* review, we will dismiss the appeal.

## I. LAW

A petitioner who is the spouse or former spouse of a U.S. citizen may self-petition for immigrant classification if the petitioner demonstrates that they entered into the marriage with the U.S. citizen spouse in good faith, and the petitioner was battered or subjected to extreme cruelty perpetrated by the petitioner's spouse. Section 204(a)(1)(A)(iii)(I) of the Act. Among other things, a petitioner must establish that their current or prior marriage to a U.S. citizen was "within the past 2 years," and that they are eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act. Section 204(a)(1)(A)(iii)(II) of the Act. The burden of proof is on a petitioner to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

## II. ANALYSIS

The Petitioner filed her VAWA petition on April 16, 2019, based on her previous marriage to L-S-.[1] Although she claimed she divorced L-S- on [redacted] 2017, the Director denied the petition, finding that evidence in the record indicated that the marriage was terminated on [redacted] 2017, more than two years before the petition was filed. The Director therefore concluded that the Petitioner could not demonstrate a qualifying relationship to a U.S. citizen or her corresponding eligibility for immigrant classification, as required.

[1] We use initials to protect the identity of the individuals in this case.

The Petitioner filed a motion to reopen and reconsider, arguing that under New York law, her divorce was not actually finalized until [redacted] 2017, when the judgment of divorce was entered by the clerk, not on the date it was signed by the Special Referee. She submitted, in part, a printout from the website NYCourts.gov stating that a "decision can't be enforced until a judgment is entered," and two pages from a Hornbook Series (Student Edition) on New York Practice. The Director dismissed the motion. Citing cases from the Fifth Circuit Court of Appeals, the Second Circuit Court of Appeals, and two New York State cases, the Director concluded that entry of judgment is not required for a judgment of divorce to become effective under New York law.

On appeal, the Petitioner repeats her argument that her divorce was not legally terminated until the judgment of divorce was entered by the clerk of the court and, therefore, her VAWA petition was timely filed. She quotes from *Musso v. Ostashko*, 468 F.3d 99, 107 (2d Cir. 2006), that "*as between spouses*, actual entry of the divorce judgment is immaterial so long as a divorce has in fact been granted. . . . But *as between a spouse and a third party* (such as a judgment lien creditor), entry of the judgment is critical, under New York law, to cementing the spouse's interest in the property." (Emphasis in original) (citations omitted). According to the Petitioner, nothing in her case involves anything between her and her ex-husband, but rather, involves USCIS as a third party, and, therefore, her divorce was not finalized until it was entered by the clerk of the court. She contends that Congress intended for VAWA to be generously interpreted and asks that we reverse the Director's conclusion that she missed the deadline to file her VAWA petition.

We agree with the Director that the Petitioner's VAWA petition was not filed within two years of her prior marriage, as required. The judgment of divorce in the record shows it was signed by a Special Referee of the New York Supreme Court on [redacted] 2017, at the New York Supreme Court at the Courthouse of [redacted] It specified that all matters arising out of the marriage had been resolved after due deliberation between the parties occurred on [redacted] 2017, "as set forth in a separate findings of fact and conclusions of law signed simultaneously herewith,"[2] and concluded it was "Ordered, adjudged and decreed that the marriage between [the parties] is hereby dissolved . . . ." It was subsequently stamped as "filed & recorded" and "entered" on [redacted] 2017, by the County Clerk [redacted]

It is well settled that under New York law, a divorce is effective on the date the referee or other judicial official signs the judgment of divorce, and not when the judgment of divorce is filed with the clerk's office. *See, e.g., Flythe v. Astrue*, 2012 WL 38927, at *3 (S.D.N.Y. 2012) ("the divorce judgment clearly states above the presiding judge's signature that the divorce was 'granted' . . . [and t]hus, the entry by the clerk of the written judgment . . . was a simply ministerial act and the divorce was effective as of the date of the judge's order.") (citing cases); *Van Pelt v. Van Pelt*, 568 N.Y.S.2d 160, 161 (App. Div. 1991) (stating that it was clear the trial court rendered its determination when it stated that the "judgment of divorce [is] granted" and that entry of that final judgment of divorce more than two months later "constituted nothing more than a mere formality or ministerial act"); *Handzel v. Handzel*, 399 N.Y.S.2d 79, 80 (App. Div. 1977) ("the [divorce] judgment is generally final as of the time the court signs it and not when it is entered"); *Jayson v. Jayson*, 387 N.Y.S.2d 274, 275 (App. Div. 1976) ("The entry of the judgment of divorce is a mere formality or ministerial act."); *In re Adoption of*

[2] The record does not include a copy of the separate findings of fact and conclusions of law.

*Anonymous*, 337 N.Y.S.2d 428, 429 (N.Y. Surr. Ct. 1972) ("A final judgment is to be contrasted with the entry or docketing of the judgment which is ministerial in character."); *Cornell v. Cornell*, 7 N.Y.2d 164, 168 (App. Div. 1959) (finding that the basis for entry of a final judgment of divorce is the decision of the court, and the entry of such judgment is the ministerial act of the clerk of court); *see also Joseph v. Holder*, 720 F.3d 228, 230-31 (5th Cir. 2013) (finding that under New York law, "entry of judgment is not required for a judge's order in a divorce proceeding to become effective as between the spouses").

The Petitioner's reliance on *Musso*, a bankruptcy case in which the petition for bankruptcy was filed after the divorce proceedings but prior to the entry and docketing of the divorce judgment by the clerk, is unpersuasive. The Court in *Musso* found that the entry and docketing of the divorce judgment was immaterial as between spouses because the parties had an opportunity to participate in the proceedings in which their property rights have been determined, but that the entry of the divorce judgment was critical to the property interests of a third party, such as a judgment lien creditor. *Musso*, 468 F.3d at 107. Contrary to the Petitioner's assertion, USCIS has no property interest in, and is not a "third party," to any proceeding and, as such, *Musso* is inapplicable here.

The language of section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act clearly states that to remain eligible for immigrant classification despite the termination of a marriage to a U.S. citizen spouse, a petitioner must have been the *bona fide* spouse of a U.S. citizen "within the past 2 years." The Act does not contain any exception under which a petitioner may file a VAWA petition after the two-year period following the termination of marriage. We may not change the terms of the statutory eligibility requirements and lack the authority to waive or disregard the requirements of the Act and implementing regulations. *See e.g., United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (as long as regulations remain in force, they are binding on government officials); *Mejia Rodriguez v. U.S. Dep't of Homeland Sec.*, 562 F.3d 1137, 1142-45 (11th Cir. 2009) (explaining that unless a statute authorizes the Secretary of the Department of Homeland Security to exercise their discretion, the Secretary's determination of eligibility is not discretionary).

The Petitioner filed her VAWA petition on April 16, 2019, more than two years after her prior marriage was ordered, adjudged, and decreed as dissolved by a Special Referee on [redacted], 2017. The Petitioner is therefore ineligible for VAWA classification because she has not demonstrated a qualifying spousal relationship with a U.S. citizen, or that she is eligible for immediate relative classification based upon that relationship. *See* section 204(a)(1)(A)(iii)(II) of the Act. The petition will therefore remain denied.[3]

**ORDER:** The appeal is dismissed.

[3] As the Director made no further findings, we do not address whether the Petitioner has established the remaining eligibility requirements for relief under the VAWA provisions.