U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21798897

Date: JUL. 13, 2022

Motion on Administrative Appeals Office 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 and corresponding eligibility for immigrant classification. We dismissed the Applicant's appeal, and she now files a motion to reconsider, arguing that we erred in the decision dismissing her appeal. Upon review, we will dismiss the motion.

I. LAW

A petitioner who is the spouse of a U.S. citizen may self-petition for immigrant classification under VAWA if the petitioner demonstrates that they entered into the marriage with the U.S. citizen spouse in good faith and that during the marriage, the petitioner or their child was battered or subjected to extreme cruelty perpetrated by the spouse. Section 204(a)(1)(A)(iii)(I) of the Act; 8 C.F.R. § 204.2(c)(1). In addition, a petitioner must show that they are eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and are a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act; 8 C.F.R. § 204.2(c)(1). Further, a petitioner who is divorced from his or her United States citizen spouse must demonstrate that he or she was a *bona fide* spouse of a United States citizen within the past two years. Section 204(a)(1)(A)(iii)(II)(CC) 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). While we must consider any credible evidence relevant to the VAWA petition, we determine, in our sole discretion, what evidence is credible and the weight to give to such evidence. Section 204(a)(1)(J) of the Act; 8 C.F.R. § 204.2(c)(2)(i).

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or

policy. 8 C.F.R. § 103.5(a)(3). The motion to reconsider must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

In our prior decision dismissing the Applicant's appeal, incorporated here by reference, we determined that because the Petitioner's divorce occurred more than two years before she filed her VAWA petition, she cannot establish a qualifying relationship with her U.S. citizen spouse and eligibility for immediate relative classification based on that relationship. Specifically, we concluded that section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act is a statute of repose not subject to equitable tolling. Further, we noted that Congress did not authorize U.S. Citizenship and Immigration Services (USCIS) to exercise discretion when applying the two-year statutory deadline in enacting section 204(a)(1)(A)(iii)(II) of the Act, and the Act does not contain any exception under which a petitioner may file a VAWA self-petition after the two-year period following the termination of marriage. Finally, we maintained that the fact that the Director made a *prima facie* determination does not prevent USCIS from denying the Petitioner's VAWA petition after full review of all of the evidence.

On motion, the Petitioner makes similar arguments to those on appeal. The Petitioner argues that the two-year requirement under section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act is a statute of limitations, which is eligible to be equitably tolled, rather than a statute of repose, which does not allow for tolling. The Petitioner states that we did not follow Supreme Court precedents in reaching our prior decision and that she satisfies the requirements of equitable tolling. In the alternative, the Petitioner further argues that the doctrines of collateral estoppel, res judicata and law of the case apply, and that the Director is estopped from denying the case on the basis of the two-year limitation after accepting the VAWA petition for filing, finding that the Petitioner was *prima facie* eligible, and extending the *prima facie* determination.

The Petitioner asserts that the two-year deadline to file a VAWA petition is a not a jurisdictional limitation and not a statute of repose, as discussed in *Dolan v. U.S.*, 560 U.S. 605 (2010) and other cases cited by the Petitioner. Rather, she contends that the deadline is a statute of limitations that we have authority to equitably toll and states that the two-year time limit is a timing of a claim that may be filed with USCIS, which regulates the timing but does not preclude tolling. The Petitioner also cites the United States Supreme Court's holding in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). In that decision, the Supreme Court examined whether a requirement under section 411(a) of the Copyright Act, 17 U.S.C. § 411(a), that copyright holders register their works before suing for copyright infringement, deprives federal courts of subject-matter jurisdiction. *Id.* at 164. The Court found that this requirement is non-jurisdictional because section 411(a) of the Copyright Act does not clearly state that the registration requirement is a prerequisite to federal court jurisdiction and the statutes governing the subject-matter jurisdiction of federal courts do not include the requirement. *Id.* at 165.

The holding in *Reed Elsevier* does not lead to the conclusion that the filing deadline for a VAWA petition under section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act is a non-jurisdictional deadline. First, in enacting section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act, Congress clearly provided that the 2-year post-divorce filing requirement is a prerequisite to USCIS' jurisdiction to consider a VAWA petition. In addition, the Supreme Court held in *Dolan*, subsequent to its ruling in *Reed Elsevier*, that:

> A "jurisdictional" deadline's expiration prevents a court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute. It cannot be waived or extended for equitable reasons. Other deadlines are "claims-processing rules," which do not limit a court's jurisdiction, but regulate the timing of motions or claims brought before the court.

In enacting section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act, Congress granted USCIS the jurisdiction to consider a VAWA petition filed by an individual who was the *bona fide* spouse of a United States citizen within the past 2 years. This filing deadline is integral to the eligibility of a VAWA petitioner for the benefit sought and is not merely a "claims-processing rule."

The Petitioner also cites to *Moreno-Gutierrez v. Napolitano*, 794 F.Supp.2d 1207 (D. Colo. 2011) (stating that "although titled a 'statute of limitation,' the court concluded that the statute at issue there was actually a statute of repose because its ten-year deadline was tied to the date the product was delivered rather than the date the injury occurred giving rise to the product liability action"), and contends that the two-year requirement for a VAWA petitioner is tied to an injury, not a product delivery date. Thus, the only proper, legally consistent conclusion is that the requirement is a statute of limitations, not of repose. The Petitioner then cites to a Supreme Court decision where it has held that a statute of limitations begins to run when a cause of action accrues. *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2182 (2014). And a cause accrues when an individual can file and obtain relief. A statute of repose, on the other hand, is likened to a cutoff, a bar that exists even if a cause of action has not accrued. The Petitioner has not shown that the statute of limitations as defined in *CTS Corp.* is applicable here. Under section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, a cause of action would accrue upon a *bona fide* marriage to a U.S. citizen who batters or subjects the petitioner to extreme cruelty. A petitioner is eligible to file for VAWA status during the pendency of the marriage under section 204(a)(1)(A)(iii)(II)(aa)(AA) of the Act. Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act specifies that a petitioner who divorced a U.S. citizen spouse can only be eligible for VAWA status if the divorce took place within the last two years prior to filing; a petitioner can be cut off from VAWA eligibility based upon this deadline alone. This is separate from the issue of whether a VAWA cause of action accrued by this time. As such, in accordance with the Supreme Court's findings in *CTS Corp.*, the two-year, post-divorce filing period deadline under section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) constitutes a statute of repose.

The Petitioner further cites to *Kwai Fun Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013) *aff'd U.S. v. Kwai Fun Wong*, 135 S.Ct. 1625 (2015), in asserting that any statute restriction should be treated as a statute of limitation, absent a clear statement, and that we should look to legislative intent in making this determination. The Petitioner claims that since the VAWA statute was enacted to protect victims of abuse and cruelty from their spouses by allowing them to obtain status, it should be interpreted generously to protect these victims. Here, the congressional intent behind the two-year deadline is clear. The text of the statute plainly states that the Petitioner was required to file for her benefit within two years of divorce. Specifically, the statute provides:

> An alien who is described in subclause (II) may file a petition with the Attorney General under this clause for classification of the alien (and any child of the alien) if the alien demonstrates to the Attorney General that . . . an alien described in this subclause 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)(CC)(ccc) of the Act (emphasis added). There is nothing ambiguous about the statute's language—it clearly requires a self-petitioner to file a petition within two years after the legal termination of the marriage from the spouse. If the Petitioner had filed her VAWA petition within two years of her divorce, she would have qualified as "an immediate family relative" for purposes of the statute, assuming she also met the other required conditions of eligibility. There is no indication that Congress intended the statute's two-year deadline to be flexible or to give the agency any discretion to grant time beyond two years. *See Carrillo-Gonzalez*, 353 F.3d at 1079-80 (holding that an immigration judge is "required to comply strictly with statute's unambiguous terms" and must ensure that "[the use of equity] does not infringe upon Congress's power to determine how and when an applicant may become a citizen of the United States."). To the contrary, Congress made clear that a person must meet certain criteria in order to be eligible for a visa classification. Thus, the plain language of the statute indicates that USCIS is bound to follow the mandatory criteria set forth by Congress when determining whether the Petitioner qualifies as an "immediate family relative." In doing so, USCIS is prohibited as a matter of law from considering equitable tolling in this case. The requirement that a self-petitioner file within two years following the termination of the marriage is a condition of eligibility for which there is no waiver or equitable tolling available. The two-year period cannot be equitably tolled because the statute allows for self-petitioning during the marriage and creates a cut-off date for filing when the marriage has terminated. *See* section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act; 3 *USCIS Policy Manual* D.3(A)(1), https://www.uscis.gov/policymanual.

The Petitioner further argues, through counsel, that because the Director accepted the filing of the VAWA petition, made a determination of the Petitioner's *prima facie* eligibility, and subsequently extended the *prima facie* determination, USCIS is estopped from denying her petition on the ground that she does not meet the two-year post-divorce filing requirement. The Petitioner states that, "as a procedural issue, the *prima facie* finding went to the matter of procedure, which does qualify as a disputed issue in all cases and is therefore subject to the same analysis that a substantive issue would be." The Petitioner claims that this procedural issue is the acceptance of the filing, not the substance of the matter, which would be a final determination on a petitioner's eligibility. The Petitioner states that section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act is the procedural section at issue in this case—"[t]his section is procedural because it determines a timing matter, when a petitioner may file, "[an alien] who demonstrates a connection between legal termination of the marriage within the past [two] years and battering or extreme cruelty by the United States citizen spouse."" The Petitioner recognizes that the *prima facie* finding was not a final determination on the substance of the case, but rather, it "went to the issue of procedure and how that finding by USCIS underscores the logical deduction that 204(a)(1) is a statute of limitations." The Petitioner argues that if USCIS believed that 204(a)(1) were a statute of repose, it had a clear alternative to accepting the filing of the VAWA petition and would have rejected the case from the outset, which it did not. Instead, USCIS issued a *prima facie* finding and the Petitioner "logically deduced and do[es] now deduce that USCIS reviewed the case, apprised itself of the Petitioner's divorce date, and with full knowledge of that date and the time limit of 204(a)(1), it nevertheless issued the finding." The Petitioner further argues that USCIS

had this second opportunity, and later a third in its extension, to reject the case if it indeed believed that the Petitioner failed on the procedural matter of complying with a statute of repose, but did not do so, and by its actions affirmed its intention to treat the statute as non-jurisdictional. The Petitioner contends that pursuant to *Dolan*, USCIS "forfeits the deadline's protection." *Dolan* at 610-611 (stating that the court found that "certain deadlines are more ordinary "claims-processing rules," rules that do not limit a court's jurisdiction, but rather regulate the timing of motions or claims brought before the court. Unless a party points out to the court that another litigant has missed such a deadline, the party forfeits the deadline's protection."). The Petitioner argues that USCIS's acceptance of the filing served as the foundation for collateral estoppel/res judicata, and the *prima facie* determination issuance and extension cemented this foundation for collateral estoppel/res judicata; whether the time limit issue is defined as procedural or substantive, USCIS made a final determination on that singular issue and collateral estoppel and res judicata apply, as the Supreme Court has held that they should apply to "determinations of administrative bodies that have attained finality." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107–08 (1991).

However, first, the Petitioner's arguments that the two-year post-divorce filing requirement is procedural and not substantive is flawed. While it is a timing issue as to the filing requirements of the VAWA petition, it is determinative of a substantive issue—establishing a qualifying relationship with the Petitioner's U.S. citizen spouse and eligibility for immediate relative classification based on that relationship. Section 201(b)(2)(A)(i) of the Act. Further, a *prima facie* eligibility determination is not a final determination which guarantees final approval of a petition. The regulation provides that "[a] finding of prima facie eligibility does not relieve the petitioner of the burden of providing additional evidence in support of the petition and does not establish eligibility for the underlying petition." 8 C.F.R. § 204.2(e)(6)(ii). Additionally, a *prima facie* determination is reached based on minimal evidence. For example, to establish a *prima facie* case, a petitioner must submit a completed VAWA petition and evidence to support each of the eligibility requirements for the self-petition. In other words, a petitioner must merely address each of the eligibility requirements but need not prove eligibility in order to establish a *prima facie* case. Regardless of whether a petitioner establishes a *prima facie* case and receives a Notice of Prima Facie Case (NPFC) or not, USCIS may discover additional deficiencies while adjudicating the self-petition. 3 *USCIS Policy Manual* D.5(A)(1), https://www.uscis.gov/policymanual. As in this case, the Petitioner received a *prima facie* determination based on the mere submission of evidence, not an eligibility determination for the classification sought. Thus, USCIS's acceptance of the filing does not serve as the foundation for collateral estoppel/res judicata, and the *prima facie* determination issuance, and extension, is not determinative of the two-year post-divorce filing requirement to establish a qualifying relationship with a U.S. citizen and corresponding eligibility for immigrant classification.

Here, the Applicant has not established legal error in our prior decision. The Petitioner's divorce occurred more than two years before she filed the present VAWA petition. Accordingly, the Petitioner cannot establish a qualifying relationship with her U.S. citizen spouse and her eligibility for immediate relative classification based on that relationship. Sections 204(a)(1)(A)(iii)(II)(aa) and (cc) of the Act.

ORDER: The motion to reconsider is dismissed.