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**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS**

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In the Matter of:)	WAC99 192 52995
)	A77 321 026
)	
Venir Leticia CANABA,)	
)	
Appellant/Petitioner)	
)	

APPEAL FROM A DECISION OF THE REGIONAL DIRECTOR,
CALIFORNIA SERVICE CENTER,
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,
REVOKING THE APPROVAL OF APPELLANT'S I-360 PETITION AS WIDOW OF
A U.S. CITIZEN

BRIEF OF APPELLANT/PETITIONER

The appellant/petitioner, Venir Leticia CANABA, appeals the decision of October 13, 2005, of the Regional Director of the California Service Center of U.S. Bureau of Citizenship and Immigration Services (“CIS”) revoking the approval of her I-360 petition filed as a Widow of a United States citizen. The main issue in this case is whether the I-360 petition by Ms. Canaba was untimely filed under § 201(b)(2)(A)(i)¹ of the Immigration and Nationality Act, as amended (“INA”), as well as 8 C.F.R. § 204.2(b)(1), rendering her ineligible for a grant of the petition. In the instant case, the Regional Director erred as a matter of law in revoking the approval of the appellant’s petition as untimely filed.

FACTS

The appellant’s late husband had filed an I-130 visa petition on her behalf in December, 1996. She and her husband had hired a Mr. Francisco CAPANO, of Martinez & Martinez-Francisco Capano, of Los Angeles, CA, in December, 1996. *See* Affidavit of Venir Leticia Canaba (“Affidavit”), § 5 (attached). However, the appellant’s husband died on April 16, 1997. Within a month after her husband’s death, the appellant sought the help of Mr. Capano, who assured her that he would file an I-360 petition with the Immigration and Nationalization Service (INS) on her behalf as the widow of a United States citizen. Because of his promise to file the I-360, the appellant felt safe in

¹ Section 201(b)(2)(A)(i) provides, in relevant part, that “an alien . . . who was the spouse of a citizen of the United States for at least two years at the time of the citizen’s death . . . shall be considered . . . to remain an immediate relative after the date of the citizen’s death but only if the spouse files a petition . . . within two years after such date.”

the knowledge that it would be timely filed. Affidavit, § 9. In the months that followed, Mr. Capano assured the petitioner that the I-360 had been filed with the INS, and that petition-process was going well, even though she had heard nothing from the INS regarding the I-360 petition. *Id.* The appellant believed him. *Id.*

However, the appellant learned only in May, 1999 – more than two years after her husband’s death – that she had been the victim of fraud: Mr. Capano had not filed any petition on her behalf with the INS. Affidavit, § 10. She hired an attorney, who filed the I-360 with the INS on June 29, 1999. Affidavit, § 12. The INS approved her I-360 petition on July 3, 2000. At her interview for adjustment of status on October 16, 2001, her Application for Lawful Permanent Resident status (Form I-485), was not adjudicated, and her file was transferred to the California Service Center for further review on February 13, 2002.

On January 26, 2004, the Regional Director revoked the approval of the I-360 petition, citing 8 C.F.R. § 204.9(f). The appellant filed an appeal with the Board of Immigration Appeals (BIA) on February 9, 2004, and argued that the CIS erred as a matter of law in revoking the approval of the I-360 petition automatically without submitting a Notice of Intent to Revoke as required by 8 C.F.R. § 205.2 and failing to provide the petitioner an opportunity to rebut and submit additional evidence.

On March 1, 2004, the CIS issued a Notice of Intent to Revoke. The appellant provided additional evidence in rebuttal, and also argued that the two-year deadline of INA § 201(b)(2)(A)(i) was subject to equitable tolling,² and therefore did not begin to run until the appellant discovered the fraud wrought upon her in May, 1999. On March 21, 2005, the BIA vacated the Regional Director’s decision to revoke and remanded the

² Discussed in detail in Argument section, *infra*.

matter to the CIS. On May 18, 2005, the CIS issued another Notice of Intent to Revoke. The appellant submitted another response, in which she again argued that the two-year deadline of INA § 201(b)(2)(A)(i) was subject to equitable tolling, and that her I-360 petition was therefore timely filed. The Regional Director issued a Notice of Decision to revoke on July 15, 2005, and on September 26, 2005. The CIS then issued another decision on October 13, 2005, that supersedes the notices of July 15 and September 26, 2005. In its decision of October 13, 2005, the CIS revoked the approval of the I-360 petition, and stated that, as Mrs. Canaba had not filed her petition within two years after her husband's death, she was not eligible to file as the widow of a United States citizen under INA § 201(b)(2)(A)(i). The CIS also stated that equitable tolling does not apply in this case because there is no explicit provision for equitable tolling in § 201(b)(2)(A)(i).

ARGUMENT

INA § 201(b)(2)(A)(i) is Subject to Equitable Tolling

The CIS argues that the Petitioner's filing cannot be considered timely under the doctrine of equitable tolling because the statute contains no explicit provision for equitable tolling. The government's contention is without merit, insofar as the doctrine is read into every federal statute of limitations in situations where fraud or concealment is involved.

The legal doctrine of "equitable tolling" provides that "equity tolls the statute of limitations in cases of fraud or concealment." *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001). Where someone has been harmed by fraud and remains in ignorance of it without any fault on his or her part, a statutory bar does not begin to run until the fraud is discovered, even when there are no special circumstances or efforts on the part of the

party committing the fraud to conceal it from the knowledge of the other party.

Holmberg v. Armbrrecht, 327 U.S. 392, 397 (1946). Accordingly, the CIS's contention that equitable tolling does not apply in this case because there is no explicit provision for it under INA § 201(b)(2)(A)(i) is incorrect as a matter of law.

Equitable Tolling Applies in this Case

The facts in this case clearly call for the application of equitable tolling. Equitable tolling is premised on fraud. *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999). It applies to both statutory and regulatory deadlines. *See, for example, Fajardo v. INS*, 300 F.3d 1018, 1019 (9th Cir. 2002); *Varela v. INS*, 204 F.3d 1237, 1240 (9th Cir. 2000). In immigration cases, a finding of fraud that merits equitable tolling does not require that the alien rely upon a third party holding himself out as an attorney. *Fajardo*, 300 F.3d at 1022 (9th Cir. 2002), *Varela*, 204 F.3d at 1240, nor does it require that an alien make a claim of ineffective assistance of counsel by individuals posing as attorneys. *Iturribarria v. INS*, 321 F.3d 889, 897-98 (9th Cir. 2003). For example, where a notary has “beguiled” an alien and defrauded him, filing deadlines are equitably tolled until the fraud has been discovered. *See Lopez*, 184 F.3d at 1100; *Varela*, 204 F.3d at 1240. In other words, timeliness depends on whether the alien has filed within the required period *after* tolling is taken into account. *See Socop-Gonzales v. INS*, 272 F.3d 1176, 1196 (9th Cir. 2001) (*en banc*). Where an alien has been taken advantage of by an unscrupulous “immigration consultant” and has paid money for faulty and ineffective representation, there is no “lack of diligence” on the alien’s part for not discovering the fraud before a deadline has expired. *See Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1225 (9th Cir. 2002). An alien’s

diligence is measured by how quickly she has acted *after* a fraud has been discovered.

See id.

In this case, the petitioner had continued to engage the services of someone who said he would file the I-360 petition for her with the INS. As of May, 1997, she believed, even though she knew that Mr. Capano was not an attorney, that he would file her petition with the Service. In the months that followed, he reassured her that the adjudication of her petition was proceeding properly. When, two years later, she discovered the fraudulent conduct of Mr. Capano, who in fact did not file the petition for her, she filed the I-360 within a month. Affidavit §§ 9-12. The actions of Capano “constitute the type of fraudulent representation that triggers equitable tolling under *Varela and Lopez*.” *See Rodriguez-Lariz*, 282 F.3d at 1225. Under equitable tolling, Ms. Canaba’s I-360 petition was timely filed and properly approved by the INS in July, 2000.

INA §201(b)(2)(A)(i) is a Statute of Limitations Rather Than a Statute of Repose

Equitable tolling also applies in the instant case because the two-year deadline for filing an I-360 Widow’s Petition is a statute of limitation, rather than a statute of repose. The difference between the two is that a statute of repose is a fixed, statutory cutoff date which is independent of any variable (such as the death of a United States citizen spouse). More important, a statute of repose is not subject to equitable tolling. *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003), *citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991).

Examples of a statute of repose would be INA § 245(i)(1)(B) (establishing April 30, 2001, as the cutoff date for filing under INA § 245(i)), and the NACARA filing deadlines, which define eligibility for, *inter alia*, special-rule cancellation of removal for

aliens from Guatemala in terms of requiring that an applicant must have filed an asylum application by April 1, 1990. *See Munoz v. Ashcroft*, at 955-56; *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1162-63 (9th Cir. 2002). For petitioners filing under INA 245(i) and for NACARA-applicants, April 30, 2001, and April 1, 1990, represent respective fixed cutoff dates which are independent of any variable.

A statute of limitations, on the other hand, awaits a specific event to start the deadline clock. *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003), *citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). With regard to INA § 201(b)(2)(A)(i), the specific event, which will always vary depending on the facts of a particular case, is the death of a U.S.-citizen spouse. The statute does not apply until *after* the death of a U.S. citizen-spouse has occurred. As the two-year deadline is tied to, and dependent on, such a variable, INA §201(b)(2)(A)(i) is a statute of limitations rather than a statute of repose. Therefore, it is subject to equitable tolling.

Insofar as equity tolls the statute of limitations in cases of fraud or concealment, the doctrine of equitable tolling applies in this case. The petitioner, Venir Leticia CANABA, was a victim of fraud, and she filed her I-360 within weeks of learning of the fraud perpetrated upon her. Accordingly, the two-year deadline established by INA §201(b)(2)(A)(i) – a statute of limitations rather than a statute of repose - was equitably tolled; her filing of the petition was timely; and the CIS erred as a matter of law in revoking its approval of the petition.

CONCLUSION

In light of the foregoing, the appellant respectfully requests that the Board of Immigration Appeals reverse the decision of the Regional Director, and vacate the revocation of her I-360 petition.

Respectfully submitted,

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Attorney for Appellant

Dated: October 20, 2005