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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B9

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 14 2004

EAC 02 152 53578

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Special Immigrant Battered 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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Vermont Service Center Director denied the preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a native and citizen of Peru who is seeking classification as a special immigrant 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 the battered spouse of a United States citizen.

The director denied the petition, finding that the petitioner failed to establish that he is a person of good moral character and that he entered into his marriage in good faith.

On appeal, counsel for the petitioner submits a brief and additional evidence.

Section 204(a)(1)(A)(iii) of the Act provides, in pertinent part, that an alien who is the spouse of a United States citizen, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his spouse, may self-petition for immigrant classification if the alien demonstrates to the Attorney General that—

> (aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and
>
> (bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

The regulation at 8 C.F.R. § 204.2(c)(1)(i) states, in pertinent part, that:

> A spouse may file a self-petition under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:
>
> > (A) Is the spouse of a citizen or lawful permanent resident of the United States;
> >
> > (B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;
> >
> > (C) Is residing in the United States;
> >
> > (D) Has resided . . . with the citizen or lawful permanent resident spouse;
> >
> > (E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage;

(F) Is a person of good moral character; [and]

* * *

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

On the Form I-360, the petitioner indicated that he last entered the United States on July 28, 1996 as a visitor. According to the evidence on the record, the petitioner wed United States citizen Janett Salcedo, 15 years his senior, on November 2, 1997 in Reno, Nevada. The petitioner's spouse filed a Form I-130 petition on his behalf on November 19, 1997. On April 4, 2002, the petitioner filed a Form I-360 self-petition claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, his U.S. citizen spouse during their marriage.

The regulation at 8 C.F.R. § 204.2(c)(i) requires the petitioner to show that he is a person of good moral character.

The alien, in any application where good moral character is a necessary element of eligibility, has the burden of establishing good moral character. *See Brownell v. Cohen*, 250 F.2d 770 (D.C. Cir. 1957); *Estrada-Oreja v. Del Guercio*, 252 F.2d 904 (9th Cir. 1958); *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967).

The director denied the petition, in part, because the petitioner had failed to establish that he is a person of good moral character. The director found that the petitioner was statutorily barred from establishing good moral character because the petitioner is or was a habitual drunkard and has given false testimony for the purpose of obtaining immigration benefits.

Section 101 of the Act, 8 U.S.C. § 1101, states, in part:

(f) For the purpose of this Act, no person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was –

(1) a habitual drunkard;

* * *

(6) one who has given false testimony for the purpose of obtaining any benefits under the Act.

In his decision, the director informed the petitioner that "[y]ou have been convicted twice of driving under the influence and referred to a multiple offenders alcohol program, which would appear to qualify you as a habitual drunkard as far as immigration matters are concerned."

On appeal, counsel for the petitioner asserts the petitioner is not a "habitual drunkard" as defined in a brief written by students at the University of California at Davis in a different matter, and submits the brief to CIS and AAO.

In the instant case, the petitioner has been arrested and convicted of driving under the influence on two occasions. He was arrested on January 26, 1997 in Sunnyvale, California,[1] and charged on two different counts of driving

[1] C9730435.

under the influence (V.C. 23152(b) and V.C. 23152(a)) and one count of reckless driving (V.C. 23103(a)). The petitioner pled guilty to one count of driving under the influence (V.C. 23152(b)) and was sentenced to serve ten days. He was ordered to enroll and complete a first offender alcohol program.

Four months later, the petitioner was arrested on May 25, 1997. [2] He was charged on two counts of driving under the influence (V.C. 23152(a) and (b)). He was charged with driving when privilege suspended or revoked for driving under the influence, with excessive blood alcohol or when addicted (V.C. 14601.2). The petitioner pled guilty to one count of driving under the influence and to driving when privilege revoked for driving under the influence. He was given a suspended 60-day sentence and formal probation for three years. He was also ordered to complete a multiple offender alcohol program.

The record further indicates that the petitioner was arrested on December 25, 1999 in Redwood City, California and was charged with disorderly conduct/intoxicated in public (PC 647(f)). The charge was dropped.

According to an FBI investigation, an order for protection was issued, restraining the petitioner from assaulting, threatening, abusing, etc., an unnamed victim. The order for protection expired on December 27, 2003.

The issue is whether the petitioner meets the definition of "habitual drunkard." The term "habitual drunkard" is not defined in the Act. The only precedent is a BIA decision, *Matter of H-*, 6 I&N Dec. 614 (BIA 1955) that held that the respondent is a habitual drunkard on the basis of a doctor's testimony. In *Matter of H-*, the alien's physician testified that the respondent had been involuntarily committed to a hospital for treatment and that the alien had managed to leave the hospital surreptitiously on several occasions and immediately began drinking heavily, necessitating his immediate and forcible return to the hospital. The physician further testified that from a reading of hospital records, he could conclude that the respondent had been a chronic alcoholic since 1953. *Matter of H*, 6 I&N Dec. at 616. The term "chronic alcoholic" is defined in one medical dictionary[3] as follows: " "[a] pathologic condition, affecting chiefly the nervous and gastroenteric systems, associated with impairment in social and occupational functioning, caused by the habitual use of alcoholic beverages in toxic amounts."

In review, the record does not establish that the petitioner is a habitual drunkard. According to the petitioner's counsel, the petitioner is gainfully employed and has not had an arrest since 1999, almost five years prior to this decision; and there is nothing more in the record to show more recent offenses.

The next issue to be addressed is whether the petitioner has given false testimony for the purpose of obtaining any benefits under the Act.

In his decision, the director stated that the petitioner had written in an affidavit signed under the penalty of perjury that he had been convicted for driving while intoxicated shortly after he arrived in the United States but that he had not done it again. The director further stated that the petitioner's criminal record contradicts the petitioner's sworn statement because the petitioner was arrested and convicted twice for driving under the influence, first in January 1997 and again on May 1997.

The petitioner's March 25, 2002 affidavit is in the record. The petitioner stated:

> I am a person of good moral character. I have been convicted for driving while intoxicated, but other than that I have a clean record. In my country it isn't considered a crime to drive

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[2] E9702496.

[3] *On-line Medical Dictionary* at htt;://cancerweb.ncl.ac.uk/cgi-bin/ as accessed on October 20, 2004.

> while drinking, and my arrest happened right after I arrived in this country. Now I know that it is wrong to drive while intoxicated, and I haven't done it since. I complied with all of the community service that was given me for the arrest, and I have had no problems since."

On appeal, counsel for the petitioner cites a 9th Circuit Court decision for the proposition that "false testimony" is limited to false statements made under oath in front of a court or tribunal. *Torres-Guzman v. INS*, 804 F.2d 531 (9th Cir. 1986).

In review, the petitioner has given false and misleading information in a sworn statement for the purpose of obtaining immigration benefits, but a written statement is not tantamount to testimony. *See Kungys v. United States*, 465 U.S. 759, 780 (1988) (false statements made in an application are not included because this section only encompasses oral statements). Therefore, the petitioner is not statutorily barred pursuant to section 101(f)(6) of the Act.

The next issue to be addressed is whether the petitioner established that he entered into the marriage in good faith. The director determined that the petitioner had furnished insufficient evidence to establish that he entered into the marriage in good faith, therefore the director issued a request for additional evidence. The director listed evidence the petitioner could submit to establish that he entered into the marriage in good faith. The evidence on the record includes the following:

- Multiple photographs of the petitioner, his citizen wife and her son, allegedly taken over a two-year period.
- Four bank statements of a jointly held account at the Bank of America dated: June 18, 1998; September 18, 1998; November 17, 1998; and August 21, 2000. The bank account balances ranged from $4.24 in June 1998 to $645.49 in August 2000.
- The petitioner's affidavit.
- Affidavits of the petitioner's friend and niece and sister.
- Two letters allegedly written by the petitioner's wife's mother and sister.
- A letter written by a former neighbor of the petitioner.
- The petitioner's income tax return for 2001 in which he filed as a single person.

The letters and affidavit of friends and family are vague. The director noted discrepancies in the photographs. Photographs are not persuasive evidence. The petitioner failed to submit evidence of insurance policies in which he or his spouse is named as the beneficiary. He failed to submit tax records and other documents that show he shared accounts and other financial responsibilities with his wife. He provided no evidence of joint ownership of property. No children were born of the marriage. The evidence is insufficient to establish that the petitioner entered into the marriage in good faith. For this reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.