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U.S. Citizenship and Immigration Services

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[redacted]

MAY 13 2004

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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.

Cindy M. Gomez for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The case will be remanded to the director for further action.

The petitioner is a native and citizen of Mexico 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 determined that the petitioner failed to establish that he is a person of good moral character. The director, therefore, denied the petition.

On appeal, counsel asserts that the applicant's 1997 conviction for assault against his wife was connected to the abuse he suffered at the hands of his spouse. She further asserts that this conviction does not statutorily bar the applicant from a finding of good moral character because the offense qualifies as a petty offense that is waivable under section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

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

> (i) 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 in the United States 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;
> >
> > (G) Is a person whose deportation (removal) would result in extreme hardship to himself, herself, or his or her child[1]; and
> >
> > (H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The record reflects that the petitioner entered the United States without inspection during the year 1990. The petitioner married his United States citizen spouse on March 31, 1997 at Houston, Texas. On January 23,

[1] On October 28, 2000, the President approved enactment of the Violence Against Women Act, 2000, Pub. L. No. 106-386, Division B, 114 Stat. 1464, 1491 (2000). Section 1503(b) amends section 204(a)(1)(A)(iii) of the Act so that an alien self-petitioner claiming to qualify for immigration as the battered spouse or child of a U.S. citizen is no longer required to show that the self-petitioner's removal would impose extreme hardship on the self-petitioner or the self-petitioner's child. *Id.* section 1503(b), 114 Stat. at 1520-21.

2001, a self-petition was filed by the petitioner 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.

8 C.F.R. § 204.2(c)(1)(i)(F) requires the petitioner to establish that he is a person of good moral character. Pursuant to 8 C.F.R. § 204.2(c)(2)(v), primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check for each locality or State in the United States in which the self-petitioner has resided for six or more months during the three-year period immediately preceding the filing date of the petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self petition.

The director noted that the record shows that the assault charge to which the petitioner pled guilty was for domestic violence against his citizen spouse. He further noted that the arrest report indicates that the petitioner struck his spouse in the mouth with his closed fist after an altercation and cited other aggressive behavior involved in the incident. Based on the nature of the domestic abuse assault, the director determined that the petitioner should not be found to be a person of good moral character.

Section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2), provides that aliens inadmissible and ineligible to receive visas and ineligible to be admitted to the United States include:

> (A)(i) Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of --
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or...

The record reflects that on September 10, 1997, in the District Court, County Criminal Court at Law No. 6, Harris County, Texas, the applicant entered a plea of guilty to assault, a Class A misdemeanor. He was found guilty of the offense and sentenced to imprisonment for a period of 4 days, with 2 days credit for time served.

In most instances, mere or simple assault or battery does not involve moral turpitude. In this case, the court's indictment record reflects that the applicant unlawfully, intentionally, and knowingly caused bodily injury to Ms. [redacted] (the petitioner's spouse). The arrest report further shows that the petitioner struck Ms. [redacted] with a closed fist that resulted in some swelling to her mouth and small cuts on the inside of her mouth. Consequently, the crime of assault in this case was more serious than simple assault and, therefore, constitutes a crime involving moral turpitude pursuant to section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(2)(A)(ii) of the Act provides for an exception to inadmissibility of an alien convicted of only one crime of moral turpitude, where the maximum penalty possible for the crime did not exceed imprisonment for one year, and the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed). Pursuant to section 12.21 of the Texas Criminal Code, a Class A misdemeanor is punishable by a fine not to exceed $2,000, confinement in jail for a term not to exceed 180 days, or both such fine and confinement. In this case, the applicant was sentenced to imprisonment for 4 days (2 days credit for time served). He, therefore, qualifies for this exception to inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

Section 204(a)(1)(C) of the Act states:

> Notwithstanding section 101(f), an act of conviction that is waivable with respect to the petitioner for purposes of a determination of the petitioner's ability under section 212(a) or deportability under section 237(a) shall not bar the Attorney General from finding the petitioner to be of good moral character under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty.

Counsel asserts that the new law applies to the petitioner because his conviction was connected to having been constantly abused by his wife, and this conviction is waivable under section 212(a)(2)(A)(ii)(II) of the Act.

The record in this case reflects that the petitioner was convicted of only one crime of moral turpitude. Further, the arrest report reflects that the act was connected to domestic violence. The petition, however, will be remanded to the service center director for consideration in light of the additional circumstances surrounding this case.

The record reflects that the petitioner was removed from the United States on October 24, 2002. While the petitioner's subsequent reentry to the United States may render him inadmissible to the United States pursuant to section 212(a)(9)(A), there is no evidence in the record to establish that the petitioner has returned to the United States since his removal.

The record of proceeding reflects that on March 31, 1997, the petitioner married his United States citizen spouse. On September 11, 1997, the petitioner was issued a notice to appear (Form I-862) in removal proceedings, based on his inadmissibility to the United States, pursuant to section 212(a)(6)(A)(i) of the Act, as an alien present in the United States without admission or parole. A self-petition, Form I-360, was filed by the petitioner on January 23, 2001, 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 director denied the I-360 petition on July 13, 2001. An appeal, based on this denial was filed on August 14, 2001.

On July 29, 2002, an immigration judge ordered the petitioner removed from the United States to Mexico. A notation was made on the "Record of Action" by the trial attorney on August 30, 2002, that "There appears to be an Appeal in File....The Appeal is not related to the Removal Order of 7-29-02---The Appeal is related to the 7-2000 Denial of R's I-360, denied by the Vermont Serv. Ctr."

The petitioner was removed from the United States to Mexico on October 24, 2002. He was advised that he was inadmissible to the United States pursuant to section 212(a)(6)(A)(i) of the Act, and that in accordance with the provisions of section 212(a)(9) of the Act, he was prohibited from entering, attempting to enter, or being in the United States for a period of 10 years from the date of his departure from the United States.

Section 212(a)(6)(A)(ii) of the Act, however, provides for an exception to inadmissibility of certain battered spouses and children who have been battered or subjected to extreme cruelty by a spouse or parent. The petitioner, in this case, may have had certain relief available to him under section 204(a)(1)(A)(iii) of the Act because he had a Form I-360 petition as an immigrant battered spouse pending.

Therefore, the case will be remanded so that the service center director may review the record of proceeding to determine whether all other criteria listed in 8 C.F.R. 204.2(c)(1) have been satisfied. The service center director shall also determine whether the case should be referred to the appropriate field office director for further review and consideration of reopening the case before an immigration judge for reversal of the removal order.

ORDER: The director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.