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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUL 22 2005
EAC 03 105 52208

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

B 9

PETITION: Petition for Special Immigrant Battered Spouse Pursuant to Section 204(a)(1)(B)(ii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

ON BEHALF OF PETITIONER:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The director initially denied the petition on July 9, 2004. The director reopened the case on its own motion on December 14, 2004 and again denied the petition. 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 Bolivia who is seeking classification as a special immigrant pursuant to section 204(a)(1)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(ii), as the battered spouse of a lawful permanent resident of the United States. The record of proceeding contains evidence that the petitioner was placed in removal proceedings on October 30, 2000. The proceedings were administratively closed on February 14, 2003.

Section 204(a)(1)(B)(ii) of the Act provides, in pertinent part, that an alien who is the spouse of a lawful permanent resident of the United States, who is a person of good moral character, who is eligible to be classified as an immediate relative, and who has resided with his or her spouse, may self-petition for immigrant classification if the alien demonstrates to the [Secretary of Homeland Security] 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;

* * *

(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.

The record reflects that the petitioner married [REDACTED] in [REDACTED] on October 9, 1989. On or about June 1994, the petitioner entered the United States without inspection. The petitioner's spouse was granted lawful permanent residence on February 8, 2000. On February 14, 2003, 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, her permanent resident spouse during their marriage.

The regulation at 8 C.F.R. § 204.2(c)(1)(i)(F) requires the petitioner to establish that she is a person of good moral character.

Section 101(f) of the Act provides for classes of aliens who are unable to establish good moral character. However, even if the petitioner is not statutorily barred from establishing good moral character, section 101(f)(8) of the Act, 8 U.S.C. § 1101(f)(8), provides: "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." In exercising its discretion, Citizenship and Immigration Services (CIS) must weigh both positive and negative factors. *See Torres v. Guzman v. INS*, 804 F.2d 531 (9th Cir. 1986).

The regulation at 8 C.F.R. § 204.2(c)(2)(v) states, in pertinent part:

Good moral character. 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 from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition.

At the time of filing, the petitioner submitted no documentation to establish eligibility. Accordingly, on January 7, 2004, the director requested further evidence. As it relates to the petitioner's good moral character, the director specifically indicated that the petitioner should submit:

1. Your own affidavit supported by police clearances...or records from each place you resided for at least 6 months during the 3-year period before filing this petition...If you have resided outside the United States during this 3-year period, you must submit police clearances from those locations.
2. If police clearances, criminal background checks, or similar reports are not available for some or all locations, please submit an explanation and submit other evidence to support your affidavit. Evidence may include affidavits from responsible persons who can knowledgeably attest to your good moral character.

* * *

Please note: if the police clearance is researched by name only, you must supply the law enforcement agency with all aliases you have used, including maiden and/or married name(s), if applicable.

* * *

If your police clearance letter or your own statement indicates that you have been arrested or charged with any crime, please submit the following:

1. copies of the arrest report(s);
2. copies of court documents showing the final disposition of the charge(s); and
3. relevant excerpts of law for that jurisdiction showing the maximum possible penalty for each charge.

The petitioner, through counsel, responded to the director's request on March 4, 2004 and requested additional time in which to provide the requested documents. The director granted the petitioner's request for additional time on March 22, 2004. On May 21, 2004, the petitioner responded with additional evidence.

As it relates to the petitioner's good moral character, counsel states:

Your office . . . requests to have police clearances or certified court dispositions for all of [the petitioner's] arrests. Exhibit eight is a copy of the certified court disposition for when [the petitioner] was arrested in 1992. *NOTE* that the final disposition from judge was a *nolle prosequi* on Commonwealth's motion. Also a second arrest in 1996 where she was found guilty but this falls within the petty theft exceptions of the INA.

Moreover, find two affidavits from [redacted] and [redacted] in support of [the petitioner's] good moral character (exhibit nine).

It appears that counsel mischaracterized the director's request for evidence by stating that the director "requests to have police clearances *or* certified court dispositions." In fact, the request indicated that the petitioner should submit an affidavit and police clearances, and that if the police clearance(s) indicate an arrest, then the petitioner should also submit court documents showing the final disposition of the charge. In this instance, the petitioner has submitted court dispositions, but no affidavit from the petitioner and no police clearance from each jurisdiction the petitioner has lived for six months in the past three years.¹ Although the petitioner submitted letters from acquaintances who attest to the petitioner's good moral character, such

¹ The director's request for evidence indicated that if the police clearance was researched by name only, the petitioner must obtain a police clearance for all aliases she has used, including maiden and/or married name. In this instance, the petitioner's aliases include her maiden and married names as well as aliases.

evidence was only to be submitted “if police clearances, criminal background checks, or similar reports are not available for some or all locations.” We further note that despite the director’s request that the petitioner provide “excerpts of law for that jurisdiction showing the maximum possible penalty for each charge,” the petitioner provided no such documentation.

The petitioner is free to submit other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. See 8 C.F.R. § 103.2(b)(2)(i). In this instance, the petitioner has failed to provide any statement or official documentation that establishes such police clearances or background checks are not available. *Id.*

A review of the certified copies of the petitioner’s dispositions confirm counsel’s statement that the 1992 charge against the petitioner for the willful concealment of clothing and linens valued at \$220 was not pressed,² and that the petitioner was found guilty of the 1996 charge of stealing merchandise³. However, despite counsel’s assertion that the 1996 arrest “falls within the petty theft exceptions of the INA,” counsel fails to elaborate on this argument or provide any documentation to support this assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director denied the petition noting that “nothing was submitted to verify that [the 1992 and 1996] charges were the only charges that have been made against [the petitioner]” and that “complete records are required in order to make an informed decision.” In addition to the names used by the petitioner at the time of her arrests, [REDACTED]” and [REDACTED]” the director noted that the petitioner also used the names [REDACTED]” [REDACTED]” and [REDACTED]”

On January 14, 2005, the petitioner, through counsel, filed a timely appeal and requested an additional 30 days to submit “separate evidence.” On February 18, 2005, counsel submitted a brief and a copy of the petitioner’s divorce decree. Counsel did not, however, submit any additional evidence related to the petitioner’s good moral character.

In his brief, counsel references case law regarding good moral character and argues that, “as a matter of discretion,” the AAO should apply “a lower standard than moral excellence,” and a “‘totality’ approach.” While the case law cited by counsel is relevant to a finding of good moral character, we can only reach the application of the standards and approaches cited once we have a complete record regarding the petitioner’s good moral character. As noted previously, the petitioner has failed to provide documentary evidence that she obtained a police clearance or a criminal background check from each jurisdiction where she lived for at least six months during the three-year period prior to filing. Information contained in the record reflects that the

² Fairfax County, case number [REDACTED].

³ Alexandria, Virginia criminal case number [REDACTED].

petitioner has resided in Vienna, Arlington, and Alexandria, Virginia in the years preceding the filing of the instant petition.

The dispositions submitted by the petitioner were not found based on the results of a records search performed on the petitioner, but rather because those are the arrests the petitioner has acknowledged. Without primary evidence of the petitioner's good moral character, specifically, the petitioner's affidavit, accompanied by a police clearance or background check performed by the state of Virginia or the individual local police departments noted above, the record does not contain adequate information to make a finding regarding the petitioner's good moral character, much less to weigh the positive and negative factors to determine eligibility.

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 burden has not been met in this case.

We note that while this determination does not preclude the filing of a new I-360 petition with the necessary documentation to establish eligibility, such documentation will not be accepted at any future point in connection with the instant petition and proceedings. The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). We emphasize that the director did not request some vague class of documentation, but rather specific documents (such as police clearance for all aliases), leaving no ambiguity as to what documents were required. If the petitioner had wanted the submitted evidence to be considered, she should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and will not consider the sufficiency of the evidence submitted on a subsequent motion.

ORDER: The appeal is dismissed.