



U.S. Citizenship
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FILE:



EAC 03 132 53178

Office: VERMONT SERVICE CENTER

Date: APR 06 2006

IN RE:

Petitioner:



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:



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, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded to the director for further consideration and entry of a new decision.

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 denied the petition, finding that the petitioner failed to establish that she is a person of good moral character.

The petitioner, through counsel, submits a timely appeal.

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 [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.

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

(f) For the purposes 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 -

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 212(a) of this Act; or subparagraphs (A) and (B) of section 212(a)(2) . . . if the offense, described therein, for which such person was convicted or of which he admits the commission, was committed during such period.

Section 212(a) of the Act, 8 U.S.C. § 1181(a), provides, in part:

(2) Criminal and related grounds. -

(A) Conviction of certain crimes. -

(i) In general. - Except as provided in clause (ii), 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

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.

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

Good moral character. A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. . . . A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she . . . committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community.

According to the evidence contained in the record, the petitioner entered the U.S. without inspection on or about June 1, 1990 at San Ysidro, California. The petitioner wed United States citizen [REDACTED] on September 22, 1997, in Hillsboro, Oregon. The petitioner's spouse filed a Form I-130 petition in the petitioner's behalf on September 29, 1997. The petitioner concurrently filed a Form I-485, Application to Adjust Status, on that same date. The Form I-130 petition was approved on October 17, 1999, but was subsequently withdrawn by the petitioner's spouse. The Form I-130 petition and Form I-1485 application were denied on October 5, 2001. The petitioner was placed in removal proceedings on October 17, 2002.¹

The petitioner filed the instant Form I-360 self-petition on March 21, 2003, claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her U.S. citizen spouse during their marriage.

As it relates to her good moral character, at the time of filing, the petitioner indicated that she had been arrested and convicted of theft on two separate occasions. The record contains documentary evidence of the petitioner's arrests and convictions, to include:

An arrest on January 29, 1992, for theft-2, a misdemeanor under Oregon Statute 164.045. The petitioner pled guilty on April 13, 1992, was convicted and given 1 year of probation and fines.²

An arrest on August 29, 1995, for theft-2, a misdemeanor under Oregon Statute 164.045. The petitioner pled guilty on November 27, 1995, was convicted and given 1 year of probation and fines.³

The director denied the petition on July 14, 2005, finding that the petitioner had been convicted of two crimes involving moral turpitude and was therefore precluded by section 101(f) of the Act from demonstrating that she is a person of good moral character.

On appeal, counsel does not dispute the director's determination regarding the petitioner's two convictions for crimes involving moral turpitude. However, counsel argues "there is no indefinite preclusion period" and that the petitioner is not "statutorily barred from demonstrating good moral character if the crimes occurred beyond a reasonable period." To support her argument, counsel cites to *Matter of Sanchez-Linn*, 20 I&N Dec. 362, a case involving a review by the Board of Immigration Appeals (BIA) of an immigration judge's denial of an application for registry under section 249 of the Act because of the applicant's failure to establish good moral character.

We are not persuaded by counsel's argument and her reliance on *Sanchez-Linn*. In *Sanchez-Linn*, the BIA held that although section 249 of the Act did not require an applicant to establish that he or she had been a person of good moral character for any specific period of time, the applicant still had to demonstrate that he or she had been a person of good moral character for a "reasonable period of time." *Sanchez-Linn*, 20 I&N Dec. at 365. The BIA found that the respondent, who was in deportation proceedings, was not a person of good moral character because he was convicted of two crimes involving moral turpitude at least five years prior to his application for registry

¹ The petitioner has a hearing scheduled before an immigration judge in Portland, Oregon on April 10, 2006. Washington County District Court, Case number [REDACTED]
Washington County District Court, Case number [REDACTED]

and thus did not warrant a favorable exercise of discretion to grant him registry. *Id.* at 366. Contrary to the BIA's determination in *Sanchez-Linn* that discretionary relief was available although not merited, in the instant case, we are barred by the applicable statutory and regulatory provisions from any similar exercise of discretion.

As it relates to self-petitioners who have been convicted of a crime that falls with section 101(f) of the Act, section 204(a)(1)(C) of the Act states:

Notwithstanding section 101(f), an act or conviction that is waivable with respect to the petitioner for purposes of a determination of the petitioner's admissibility under section 212(a) . . . shall not bar the [Secretary of Homeland Security] from finding the petitioner to be of good moral character . . . if the [Secretary of Homeland Security] determines finds that *the act or conviction was connected* to the alien's having been battered or subjected to extreme cruelty.

[Emphasis added.]

As it relates to her 1995 arrest, on appeal, the petitioner states:

During this phase of my relationship with [REDACTED] there were ups and downs. He made me feel insecure about my weight and desirability. He made me feel like I needed to do more to keep him interested.

I was attempting to meet his standards by stealing some lingerie items.

I believed that by having and wearing nice lingerie, it was the only way that Leo would be intimate with me.

This statement made by the petitioner on appeal is contradicted by the petitioner's initial statement and by the statement made to the officer at the time of her arrest. In the statement submitted by the petitioner at the time of filing, she indicated that she stole the items "in hopes that my family would think I was doing well." In the statement given by the petitioner at the time of her arrest, the petitioner indicated that she stole the items in question, not to impress her spouse, but because "her brother is leaving for Chicago and that she just wanted to get some thing for them."⁴ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

More importantly, the record reflects that the petitioner did not wed [REDACTED] until 1997, nearly two years after the petitioner's arrest. The petitioner does not submit any evidence or provide any argument that her 1992 arrest was related to the purported abuse. Accordingly, the record does not establish that either of the petitioner's two convictions for theft was connected to her battery or subjection to extreme cruelty by her

⁴ We note that the police report indicates that she did not steal lingerie, but rather a pair of boots, a denim skirt, tights, and a green sweatshirt. A witness statement indicates that she placed lingerie in her cart and did not offer to pay for them. Nonetheless, the petitioner was not married to her citizen spouse in 1995 when she was arrested for shoplifting.

U.S. citizen husband. As such, we are barred from finding the petitioner to be a person of good moral character as a matter of discretion pursuant to section 204(a)(1)(C) of the Act.

The fact that Congress provided an exception for convictions which render a petitioner ineligible under section 101(f) of the Act only in instances where a petitioner can show a connection between the conviction and the abuse means that Congress did not intend for a petitioner to be found to have good moral character if he or she has been convicted of a crime within the purview of section 101(f) of the Act and is not able to show a connection between the conviction and the abuse. Under the maxim of statutory construction, *exceptio probat regulam*,⁵ the explicit exception provided for in this one instance proves Congress did not intend to change any other provisions related to a petitioner's convictions and their effect on the petitioner's good moral character and eligibility.

The regulation at 8 CFR 204.2(c)(1)(vii) further supports the fact that a petitioner who falls within the purview of section 101(f) of the Act cannot be found to have good moral character unless the petitioner "has not been convicted" and "extenuating circumstances" apply.

Based upon the above discussion, we find the petitioner has failed to overcome the director's ground for denial and to establish that she is a person of good moral character.⁶ However, although the petitioner has failed to overcome her ineligibility on appeal, we find the case must be remanded to the director for further consideration. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) requires the director to issue a Notice of Intent to Deny (NOID) in all cases where "the preliminary decision on a properly filed self-petition is adverse to the self-petitioner"

Despite the fact that the director's decision rested on the single issue discussed above, we find two additional issues that should be addressed on remand. Specifically, the record does not contain sufficient evidence to establish that the petitioner resided with her spouse and that she entered into the marriage in good faith. Although the record contains utility bills and phone bills as evidence of joint residence and responsibility, which date from May 1998 to January 2001, the petitioner's divorce decree indicates that she and her spouse separated in May 1999. Further, several of the bills are in the petitioner's spouse's name only. On remand, the petitioner should be afforded an opportunity to submit additional evidence to support her claim of a joint residence with her spouse and of her good faith marriage, as well as a more detailed explanation regarding her extramarital affair which resulted in a child being born outside of her marriage.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

⁵ "The exception proves the rule." See *Black's Law Dictionary*, 6th Edition (1990).

⁶ It should be noted that even if we determined that we had the discretion to waive the petitioner's convictions as the BIA did in *Sanchez-Linn*, the record does not contain "compelling evidence" of the petitioner's change of character. As it relates to applicants who have engaged in conduct that falls within the provisions of section 101(f) of the Act (e.g.; has been convicted of a crime involving moral turpitude), the BIA stated that applicants "may be required to present compelling evidence that their character has changed." We do not consider the fact that the petitioner has not been convicted of any further crimes to be "compelling evidence" that the petitioner's character has changed. The record does not contain any evidence such as the petitioner's gainful employment, responsibility for the support of her child and/or family, and/or that she is actively involved in her church or community such that we find there to be compelling evidence of the petitioner's change of character and current good moral character.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with this decision.