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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



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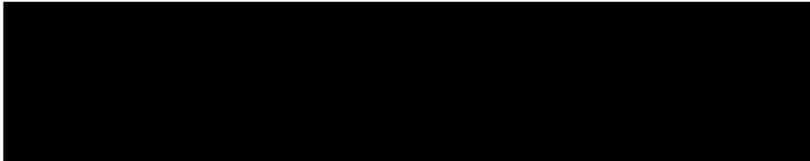
Office: VERMONT SERVICE CENTER

Date: FEB 22 2007

IN RE: Petitioner: [Redacted]

PETITION: Petition for 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:



PUBLIC COPY

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, Chief
Administrative Appeals Office

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

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition because the petitioner did not establish that his wife battered or subjected him or his child to extreme cruelty during their marriage and that he was a person of good moral character.

On appeal, counsel submits a brief.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the alien or a child of the alien was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

Section 204(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . . , or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

The eligibility requirements are further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

(vi) *Battery or extreme cruelty.* For the purpose of this chapter, the phrase “was battered by or was the subject of extreme cruelty” includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . , must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner's marriage to the abuser.

(vii) *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.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

Evidence for a spousal self-petition –

(i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

* * *

(iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

(v) *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. . . . If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such

as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

The record in this case provides the following relevant facts and procedural history. The petitioner is a native and citizen of El Salvador who states in these proceedings that he entered the United States without inspection on or about June 1, 1991. On April 30, 2001, the petitioner married P-R-¹, a U.S. citizen. On February 14, 2002, the petitioner was served with a Notice To Appear for removal proceedings as an alien present in the United States without having been admitted or paroled. The petitioner remains in proceedings before the San Francisco Immigration Court and his next hearing is scheduled for March 6, 2007. The petitioner filed this Form I-360 on April 3, 2006. The director subsequently issued a Notice of Intent to Deny (NOID) the petition for lack of the requisite battery or extreme cruelty and good moral character. The petitioner, through counsel, responded to the NOID with additional evidence. The director denied the petition on November 13, 2006 and counsel timely appealed.

On appeal, counsel claims that the director erroneously concluded that the petitioner was the primary aggressor in two specific incidents of domestic violence between the petitioner and his wife and that the director did not consider the positive factors in the petitioner's case, which support a favorable exercise of discretion. We concur with the director's determination that the petitioner failed to establish the requisite battery or extreme cruelty and good moral character. Counsel's claims on appeal fail to overcome the grounds for denial.

Battery or Extreme Cruelty

The petitioner submitted the following evidence relevant to his claim of battery or extreme cruelty:

- The petitioner's March 21, 2006 declaration in which he admits having twice been convicted of domestic violence against his wife;
- The March 21, 2006 declaration of the petitioner's wife in which she also attests that the petitioner was twice convicted of domestic violence against her;
- Copies of the Protective Order in Criminal Proceedings issued against the petitioner for the protection of his wife and their daughter on December 24, 2001 and modified on January 2, 2002;
- The Superior Court of California, San Mateo County case docket (Case No. [REDACTED] showing that the petitioner was arrested on December 22, 2001 and convicted of willful

¹ Name withheld to protect individual's identity.

infliction of corporal injury against his wife in violation of section 273.5(a) of the California Penal Code² on January 2, 2002; and

- Psychological Evaluation of the petitioner by [REDACTED] dated June 20, 2006.

In his declaration, the petitioner discusses two incidents of domestic violence between him and his wife that led to his convictions. First, the petitioner states that in the Spring of 2001 he was drinking and got into an argument with his wife. The petitioner states:

She got mad and wouldn't listen to me so I pulled her hair and made a move like I was going to push her. . . . [My wife] is a large woman and is very strong. She hit me and knocked me down on the bed. We were wrestling and [her son] called the police. [My wife] was so angry she grabbed me around the neck. The police arrived quickly and broke up the fight. They asked our son what had happened and also talked to us. Since I was the man and had made the first physical contact by pulling [her] hair, the police took me down to the police station. The policewoman told [my wife] that they could have . . . charged her with fighting too, but she had [my wife] stay in the house with [the children]. I had a severe black eye which lasted for more than two months, and also has [sic] some other bruises around my neck. [My wife] was not injured. I was charged with battery and I pled guilty. I was required to go to Alcoholics Anonymous [AA].

The petitioner explains that he went to the AA meetings, but was not convinced that he had a drinking problem and so he continued to drink.

On December 22, 2001, the petitioner states that he and his wife had a birthday party for their daughter. The petitioner explains that he went outside and drank beer. When his wife yelled at him to come inside, the petitioner states:

I did a stupid thing, I threw a soda can in her direction, and the soda spilled across her blouse. She immediately ran up to me and began hitting and slapping me. I fell down and [she] continued to hit and kick me. When I got up, I was bleeding from a split lip. [My wife] was

² Section 273.5(a) of the California Penal Code states:

Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father or his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand (\$6,000) or by both that fine and imprisonment.

furious with me so I just walked away from her and walked down the street. I was feeling sick from drinking and from the fight. I am told that I passed out on someone's lawn. An ambulance came and took me to the hospital. I was only there for a short time and they turned me over to the police. A public defender told me that I could get released quickly if I pled guilty to spousal abuse, but I still ended up spending six weeks in jail.

The petitioner explains that from jail he was sent to immigration detention, an experience that convinced him to stop drinking. The petitioner states that he has not drunk alcohol since his daughter's birthday party on December 22, 2001. The petitioner further states, "The relationship I have with [my wife] now is not predictable. It is good much of the time, but when we have an argument, she threatens that she does not have to support me for my green card. This makes me nervous when this happens."

In her declaration, the petitioner's wife also discusses the two incidents of domestic violence reported by the petitioner. Regarding the first incident, which the petitioner's wife states occurred on May 16, 2001, she reports:

We got into an argument and [the petitioner] pulled my hair and took a swing at me. I have never been a victim and I can take care of myself. I am six feet tall could [sic] easily defend myself in a fight with [the petitioner]. I pushed [the petitioner] down on the bed and hit him. I put a choke hold on him and my son . . . called the police. . . . I had [the petitioner] pinned to the bed and one of the officers told me to let him go.

The petitioner's wife confirms that the police said they could have charged her with fighting as well, but let her stay home with her children.

Regarding the second incident on December 22, 2001, the petitioner's wife states that she did not want the petitioner drinking in front of the children playing outside and so she asked him to come inside. She reports, "he threw and [sic] open soda can at me and I got soda all over my shoulder and on my blouse. I was so furious I snapped and ran over to him and began slapping and hitting him. I knocked him to the ground and hit and kicked him. When he got up, he started walking down the street. He had a split lip and it was bleeding. I was not injured but I was very upset[.]"

The petitioner's wife confirms that her husband has not drunk any alcohol since his release from immigration custody in February 2002. She concludes, "We do have arguments still, but they are never violent. . . . We are trying to make things work out now for the children."

In her psychological evaluation of the petitioner, [REDACTED] concludes that the petitioner "suffers from depression and anxiety as a result of physical, and emotional violence during his marriage." [REDACTED] indicates that her evaluation is based on one interview with the petitioner and his wife, who both acknowledged that there was domestic violence during the first year of their marriage. [REDACTED] further states that the petitioner's wife reported that "she was actually the perpetrator of the violence, in that she had been choking [the petitioner] before he threw the can of soda at her. . . . [The

petitioner's wife] reports that at times, she is still controlling and emotionally abusive with [the petitioner].”

These statements directly contradict those made by the petitioner's wife in her earlier declaration in which she reports that she did not assault the petitioner until after he threw the soda can at her and she indicates that she and her husband have reconciled. In addition, [REDACTED] evaluation was made over four years after the last incident of domestic violence on December 22, 2001. The record contains no evidence that the petitioner sought evaluation or treatment for the effects of his wife's alleged abuse prior to receiving the NOID in this case.

The statements of the petitioner, his wife and [REDACTED] are also contradicted by the admission of the petitioner and his wife that the petitioner was first convicted of battery against his wife in 2001³ and the protective order and case docket for the petitioner's conviction of willful infliction of corporal injury upon his wife on January 2, 2002. The petitioner's and his wife's explanations of the events leading to his offenses do not establish that he was the victim. As a whole, the record indicates that both convictions arose from mutually combative incidents initiated by the petitioner's threatening physical actions against his wife and the evidence does not establish that the petitioner's wife subjected the petitioner or his child to battery or extreme cruelty, as that term is explicated in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The petitioner and his wife discuss two incidents of violence, both of which led to the petitioner's conviction for battery and willful infliction of corporeal injury against his wife. The petitioner states that there have been no other incidents of physical violence between him and his wife and he fails to describe any other, specific incidents where his wife threatened him with violence; psychological or sexual abuse. The petitioner also does not indicate that his wife's nonviolent behaviors were part of an overall pattern of violence. Accordingly, the petitioner has not established that his wife battered or subjected him or his child to extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Good Moral Character

The petitioner submitted the following evidence relevant to his claim of good moral character:

- The petitioner's March 21, 2006 declaration in which he admits having twice been convicted of domestic violence against his wife;
- The March 21, 2006 declaration of the petitioner's wife in which she also attests that the petitioner was twice convicted of domestic violence against her;

³ Although both the petitioner and his wife attest to the petitioner's conviction for battery in 2001, the record does not contain a certified court record or other documentation of this conviction.

- Copies of the Protective Order in Criminal Proceedings issued against the petitioner for the protection of his wife and their daughter on December 24, 2001 and modified on January 2, 2002;
- The Superior Court of California, San Mateo County case docket (Case No. [REDACTED] showing that the petitioner was arrested on December 22, 2001 and convicted of willful infliction of corporal injury against his wife in violation of section 273.5(a) of the California Penal Code on January 2, 2002;
- Letter from the petitioner's employer at the Salvation Army Adult Rehabilitation Center in San Francisco dated December 9, 2003;
- The petitioner's Certificate of Completion of his court-ordered Alcohol and Drug Recovery program dated July 16, 2002;
- The petitioner's Certificate of Completion of his court-ordered Domestic Violence Studies dated April 22, 2003;
- Letter from the petitioner's friend, [REDACTED] dated April 8, 2005;
- Letter from the petitioner's friend, [REDACTED], dated April 9, 2005; and
- Copied photographs of the petitioner with his wife and their daughter.

The evidence demonstrates that the petitioner is not a person of good moral character because his January 2, 2002 conviction for willful infliction of corporal injury against his spouse is a crime of moral turpitude.

Section 101(f) of the Act states, in pertinent part:

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;

* * *

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in . . . subparagraphs (A) and (B) of section 1182(a)(2) of this title [section 212(a)(2) of the Act] . . . 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)(2)(A) of the Act includes, "any alien convicted of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime."

The petitioner's January 2, 2002 conviction for willful infliction of corporal injury upon his spouse in violation of section 273.5(a) of the California Penal Code is a crime involving moral turpitude. *Grageda v. I.N.S.*, 12 F.3d 919 (9th Cir. 1993); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996). *Accord Galeana-Mendoza v. Gonzalez*, 465 F.3d 1054, 1060 (9th Cir. 2006). Consequently, section 101(f)(3) of the Act bars a finding that the petitioner is a person of good moral character.

On appeal, counsel claims that the petitioner should be considered a person of good moral character despite his conviction as a matter of discretion pursuant to section 204(a)(1)(C) of the Act because his offense was connected to his wife's battery. We disagree. Section 204(a)(1)(C) of the Act allows a discretionary determination of an alien's good moral character despite his or her criminal offense if: 1) the petitioner's conviction for a crime involving moral turpitude is waivable for the purposes of determining admissibility or deportability under section 212(a) or section 237(a) of the Act; and 2) the conviction was connected to the alien's battery or subjection to extreme cruelty by his or her U.S. citizen or lawful permanent resident spouse or parent. Section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C). Although inadmissibility due to a conviction for a crime involving moral turpitude is waivable for self-petitioners under section 212(h)(1)(C) of the Act, the record in this case does not establish that the petitioner's January 2, 2002 conviction was connected to his wife's battery or extreme cruelty. As discussed in the preceding section, the evidence indicates that the petitioner's conviction arose from a mutually combative incident that the petitioner himself initiated. The record does not establish that the petitioner's wife battered or subjected him to extreme cruelty. Accordingly, the discretionary provision of section 204(a)(1)(C) of the Act does not apply to the petitioner's case.

On appeal, counsel further contends that the positive equities in the petitioner's case outweigh the negative factors and warrant a finding of the petitioner's good moral character. We acknowledge that the petitioner's employer and friends attest to his character and work ethic; that the certificates of completion show that the petitioner successfully finished his court-ordered alcohol and domestic violence programs; and that the copied photographs show the petitioner with his wife and daughter interacting as a family on five unidentified occasions. Counsel claims that the petitioner also has a close relationship with his two stepsons, but the record contains no evidence of their relationship apart from the brief statements of the petitioner and his wife that he has always had a "great relationship" with them. These documents fail to establish positive factors that outweigh the significant negative factors of the petitioner's admission of committing battery against his wife in 2001 and his conviction for willful infliction of corporal injury against his wife on January 2, 2002.

In addition, the petitioner has failed to provide evidence of his good moral character pursuant to the regulation at 8 C.F.R. § 204.2(c)(2)(v), which prescribes that primary evidence of a self-petitioner's good moral character is his or her own affidavit. In his declaration, the petitioner does not discuss his moral character. The regulation further requires submission of local police clearances or state-issued criminal background checks; or the self-petitioner's explanation of the unavailability of such documents and the submission of other evidence of the self-petitioner's good moral character. 8 C.F.R. § 204.2(c)(2)(v). The petitioner did not submit local police clearances, state-issued criminal

background checks or an explanation that such documents were unavailable to him. Moreover, the petitioner failed to fully comply with the director's request in the NOID to submit court documents indicating the final disposition of the charges leading to his May 16, 2001 conviction.

The director also determined that the petitioner lacked good moral character because he was a habitual drunkard. The record does not support that finding. In his declaration, the petitioner states that he was ordered to attend AA in connection with his conviction for battery against his wife in 2001. The petitioner states, "I went to the AA meetings, but I was not convinced that I had a major drinking problem So I continued to drink." However, both the petitioner and his wife attest that the petitioner ceased drinking after his release from immigration detention in 2002, four years before this petition was filed and the record contains no evidence that the petitioner had problems with alcohol during this time.

Moreover, the record in this case clearly does not rise to the level of that cited in the only precedent decision of the Board of Immigration Appeals (BIA) concerning a habitual drunkard. In *Matter of H*, the BIA found that the respondent could not establish his good moral character because he was a habitual drunkard. *Matter of H*, 6 I. & N. Dec. 614, 616 (BIA 1955). In that case, a psychiatrist testified regarding his personal knowledge that the petitioner was a chronic alcoholic and a habitual drunkard. *Id.* The psychiatrist stated that the respondent was committed to the hospital for treatment pursuant to a court order and declaration of mental incompetency. *Id.* Hospital records further showed that the petitioner left the hospital surreptitiously on several occasions and immediately began drinking heavily, necessitating his immediate and forcible return to the hospital. *Id.* In contrast, the petitioner here complied with his court order to attend AA meetings and ceased drinking alcohol of his own volition over four years before this petition was filed. Hence, the record does not establish that the petitioner is a habitual drunkard and the contrary portion of the director's decision is hereby withdrawn.

The petitioner has failed to demonstrate that his wife battered or subjected him or his child to extreme cruelty during their marriage and that he is a person of good moral character. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and his petition must be denied.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.