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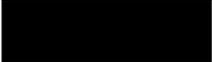


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MAR 02 2007

FILE:



Office: VERMONT SERVICE CENTER

Date:

EAC 03 256 53488

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, 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 The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner seeks immigrant classification pursuant to 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 record did not establish the petitioner's good moral character.

On appeal, the petitioner, through 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).

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

(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 person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or 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. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

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.

\* \* \*

(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. 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. 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 petitioner in this case is a native and citizen of Peru. The petitioner does not indicate when or how she first entered the United States. However, the record reflects that the petitioner was present in the United States as early as July 12, 1989 when she was arrested for aggravated assault-weapon, aggravated assault police officer, strong-arm battery, and resisting arrest with violence. On December 12, 1990, the petitioner adjusted her status in the United States to that of lawful permanent resident. According to counsel, the petitioner married A-C-P-\*, a United States citizen, in April 1993. The record further indicates that on January 4, 1994, the petitioner was arrested for cocaine possession and drug trafficking. On August 15, 1995 the petitioner was convicted of cocaine smuggling and sentenced to 5 years, 6 months of imprisonment.<sup>1</sup> Because of the petitioner's conviction, she was placed in proceedings. On March 17, 1999, the petitioner's lawful permanent resident status was terminated and the petitioner was subsequently deported as an aggravated felon. While still married to A-C-P-, the petitioner married J-W-M-\*, a citizen of the United States, in Peru on May 27, 2002. The petitioner's marriage to A-C-P- was dissolved on February 24, 2003 in the Circuit Court of the 11th Judicial District in and for Dade County, Florida. The petitioner then remarried J-W-M- in Miami, Florida on May 22, 2003. The petitioner filed the instant petition on September 12, 2003.

The director denied the petition on April 28, 2005, finding that the petitioner failed to establish that she was a person of good moral character because of her January 7, 1994 conviction and subsequent deportation as an aggravated felon.

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\* Name withheld to protect individual's identity.

<sup>1</sup> See Court Case number: 892668, Metropolitan Dade County, Circuit Court Criminal Division.

\* Name withheld to protect individuals' identity.

On appeal, counsel alleges that the director erred in finding that the petitioner lacked good moral character due to her conviction of an aggravated felony because the petitioner was eligible for a waiver under section 212(c) of the Act. Counsel cites to *INS v. St. Cyr*, 533 U.S. 289 to support her argument. The Court's holding in *St. Cyr* concerning the enduring availability of relief from exclusion and deportation under former section 212(c) of the Act does not directly apply to the petitioner's case. In *St. Cyr*, the Court held that relief from removal under former section 212(c) of the Act remained available to aliens whose convictions were obtained through plea agreements and who would have been eligible for section 212(c) relief at the time of their plea under the law then in effect. *St. Cyr*, 533 U.S. at 326.

It appears from counsel's argument that she has mistaken the instant administrative proceedings before the AAO for the types of proceedings where 212(c) relief would be available; specifically, removal or deportation proceedings under 8 C.F.R. §§ 1240.11(a)(1), 1240.20, 1240.21. The AAO does not have jurisdiction to consider applications for cancellation or suspension of removal. The AAO exercises appellate jurisdiction only over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

Counsel has failed to provide any argument or evidence to overcome the director's finding that the petitioner was convicted of an aggravated felony and accordingly that she is unable to establish that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. It is noted that although section 204(a)(1)(C) of the Act provides the Service with the discretion to waive a criminal conviction if the conviction was connected to the alien's battery or subjection to extreme cruelty, this section is only applicable to a conviction of a crime involving moral turpitude. Because no inadmissibility waiver exists for aggravated felony convictions, section 204(a)(1)(C) of the Act does not apply to the petitioner.

Although the petitioner has failed to demonstrate her eligibility for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act, the case will be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) to the petitioner. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that the Service must provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of her case.

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.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.