U.S. Department of Homeland Security
20 Mass. Ave., N.W., Room 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 04 2006

EAC 03 187 54419

IN RE: Petitioner: [redacted]

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

Marie Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Vermont Service Center Director 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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 is a native and citizen of Mexico who is seeking classification as a special immigrant pursuant to section 204(a)(1)(B)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(iii), as the battered child of a lawful permanent resident.

On January 24, 2006, the director denied the petition because the petitioner failed to establish that he is a person of good moral character.

The petitioner, through counsel, timely appealed the decision. Counsel submitted a brief.

Section 204(a)(1)(B)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(B)(iii), provides, in pertinent part, that an alien who is the child of an alien lawfully admitted for permanent residence of the United States . . . and who is a person of good moral character, who is eligible for classification under section 203(a)(2)(A), and who resides, or has resided in the past, with the lawful permanent resident parent may file a petition with the [Secretary of Homeland Security] under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the Attorney General that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's permanent resident parent.

The regulation at 8 C.F.R. § 204.2 states, in pertinent part:

(e) *Self-petition by child of abusive citizen or lawful permanent resident—*

(1) Eligibility.

(i) A child may file a self-petition under section 204(a)(1)(A)(iv) or 204(a)(1)(B)(iii) of the Act if he or she:

(A) Is the child of 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 parent;

(E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident parent while residing with that parent;

(F) Is a person of good moral character.

* * *

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

> *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 or lawful permanent resident parent, must have been perpetrated against the self-petitioner, and must have taken place during the self-petitioner was residing with the abuser.

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

> *Evidence for a child's 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.
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> * * *
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> (iii) Residence. One or more documents may be submitted showing that the self-petitioner and the abuser have resided together in eh United States. One or more documents may also be submitted showing that the self-petition is residing in the United States when the self-petition is filed Employment records, school records, hospital or medial records, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.
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> (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.

According to the evidence on the record, the petitioner is the child of J-B-, a lawful permanent resident, and N-M-.[1] He filed the instant petition on June 11, 2003. Finding the evidence submitted with the Form I-360 insufficient to establish the petitioner's eligibility, the director issued a notice requesting the petitioner to submit evidence of his good moral character on May 26, 2004. The petitioner requested an additional 60 days to respond to the request. The director granted the request. The petitioner requested another 60-day extension, which was granted and on April 20, 2005, the petitioner submitted his criminal history record.

The first issue to be addressed in this proceeding is whether the petitioner established that he is a person of good moral character. The regulation at 8 C.F.R. § 204.2(e)(1)(i)(F) requires the petitioner to establish that he is a person of good moral character.

According to the evidence on the record, the petitioner has the following criminal history:

- The Anaheim police department arrested the petitioner on July 6, 1997 and charged him with Burglary, a violation of section 459 of the California Penal Code. There is no final disposition in the record.

- The Anaheim police department arrested the petitioner on January 21, 2000 and charged him with Grand Theft from Person, a violation of section 487(c) of the California Penal Code. There is no final disposition in the record.

- The Anaheim police department arrested the petitioner on March 7, 2001 and charged him with Vandalism: Damage Property, a violation of section 594(a)(2) of the California Penal Code. There is no final disposition in the record.

- On October 11, 2001, November 29, 2001 and on September 17, 2002, the Anaheim police department arrested the petitioner and charged him with Burglary, a violation of section 459 of the California Penal Code. There is no final disposition in the record.

[1] The petitioner's parents' names are abbreviated to protect their privacy.

- The Anaheim police department arrested the petition on March 3, 2005 and charged him with Possession of Controlled Substance, a violation of section 11377(a) of the California Health and Safety code. There is no final disposition in the record.

The evidence in the record indicates that the petitioner was between eight and 16 years of age when charged with the above crimes and that he was charged as a juvenile, rather than an adult. The director determined that the petitioner had been convicted of numerous crimes of moral turpitude; however, there are no final court dispositions within the record showing whether or not the alien was convicted of the charges. Accordingly, the director's decision is withdrawn. It should be noted that even if convicted of the charges, it is unclear whether or not the petitioner would have been prosecuted as a juvenile or as an adult. Juvenile delinquency proceedings do not constitute a conviction for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362, 1365-66 (BIA 1981). We are unable to determine the final disposition and nature of the charges. Therefore, we are unable to determine that the petitioner has established that he is a person of good moral character. In this respect, the petition remains unapprovable.

Beyond the director's decision, the petitioner has not established that he resided with the allegedly abusive parent or that he was battered by, or was the subject of extreme cruelty perpetrated by, his lawful permanent resident parent. The evidence in the record relating to abuse consists of a declaration of the petitioner's mother describing how she was victimized by her husband (the petitioner's father) and a police incident report dated October 3, 1993, which details abuse the petitioner's mother suffered. The record is silent as to how the petitioner suffered abuse.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The regulation at 8 C.F.R. § 204.2(c)(3)(ii) states, in pertinent part:

> *Notice of intent to deny.* If the preliminary decision on a properly filed self-petition is adverse to the self-petition, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

In this case, the director denied the petition without first issuing a Notice of Intent to Deny (NOID). Consequently, the case must be remanded for issuance of an NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which will give the petitioner a final opportunity to establish his eligibility for classification as a special immigrant as a battered child of a lawful permanent resident.

The case will be remanded for the purpose of the issuance of a new notice of intent to deny as well as a new final decision to both the petitioner and counsel. The new decision, if adverse to the petitioner, shall be certified to this office for review.

As always in these proceedings, the burden of proof rests solely 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 this decision.