

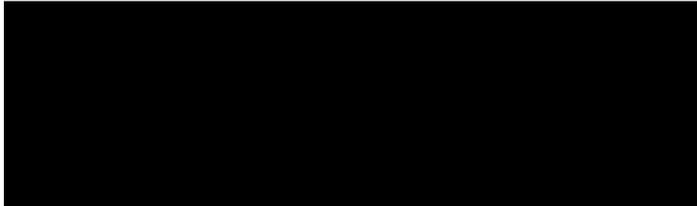
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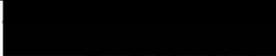
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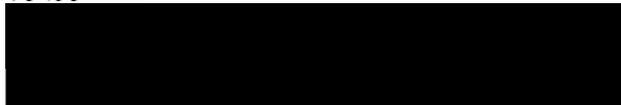
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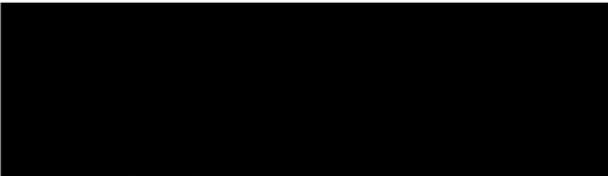
IN RE:

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 The decision of the director will be withdrawn and the petition will be remanded for further action.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 classification as a special immigrant 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 his United States citizen spouse.

The director denied the petition, finding that the petitioner failed to establish his good moral character due to his convictions for crimes involving moral turpitude.

On appeal, counsel submits a memorandum and additional evidence.

The petitioner is a native and citizen of Cape Verde who entered the United States on October 21, 1988 as a nonimmigrant visitor (B-2). On September 9, 1996, the petitioner married [REDACTED] a U.S. citizen, in Massachusetts. She filed a Form I-130 petition for alien relative on the petitioner's behalf, which was approved on January 11, 2001. On August 28, 2002, the approval of the Form I-130 petition was revoked. On September 5, 2002, the petitioner was served with a Notice to Appear for removal proceedings charging him under section 237(a)(1)(B) of the Act for remaining in the United States beyond his period of authorized stay. On February 4, 2004, the petitioner was served with an additional charge of removability under section 237(a)(2)(E)(i) of the Act as an alien convicted of a crime of domestic violence. On December 21, 2005, the Boston Immigration Court pretermitted the petitioner's application for cancellation of removal and granted the petitioner's application for voluntary departure from the United States by February 21, 2006 with an alternate order of removal to Cape Verde. On January 17, 2006, the petitioner, through counsel, appealed the immigration judge's order preterminating his cancellation application to the Board of Immigration Appeals.

On May 30, 2003, the petitioner filed the instant Form I-360 petition. On May 11, 2004, the director requested evidence of the petitioner's good moral character, specifically, copies of court documents for all his criminal arrests. The petitioner submitted additional evidence on July 28, 2004. On May 9, 2005, the director denied the petition because the record showed that the petitioner lacked good moral character due to his two convictions for assault and battery, crimes of moral turpitude. The director also found that the petitioner did not warrant a favorable exercise of discretion under section 204(a)(1)(C) of the Act because the evidence did not demonstrate a connection between his convictions and his wife's battery or extreme cruelty.

On appeal, counsel claims that the petitioner's convictions for assault and battery under Massachusetts law are not crimes of moral turpitude and, in the alternative, that the petitioner is entitled to a waiver because his convictions were connected to his wife's extreme cruelty. On appeal, counsel submits an affidavit from the petitioner and relevant copies of documents from the criminal records of both the petitioner and his wife. We concur with the director's determination that the petitioner is not a person of good moral character due to his convictions for crimes involving moral turpitude and that he does

not warrant a discretionary finding of good moral character pursuant to section 204(a)(1)(C) of the Act. Counsel's claims and the evidence submitted on appeal do not overcome the ground for denial. Nonetheless, the case will be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

The Relevant Statutory Provisions, Regulations and Caselaw

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 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 evidentiary standard and guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are contained 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. . . . 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 regulation's designation of a three-year period preceding the filing of the petition does not limit the temporal scope of the inquiry into the petitioner's good moral character. The agency may investigate the self-petitioner's character beyond the three-year period when there is reason to believe that the self-petitioner lacked good moral character during that time. *See* Preamble to Interim Regulations, 61 Fed. Reg. 13061, 13066 (Mar. 26, 1996). *See also* Memo. from William R. Yates, CIS Associate Dir.

Operations, *Determinations of Good Moral Character in VAWA-Based Self-Petitions*, 2, (Jan. 19, 2005).

The regulation at 8 C.F.R. § 204.2(c)(1)(vii) further explicates the good moral character requirement and 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.

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 –

* * *

(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 term “crime involving moral turpitude” is not defined in the Act or the regulations, but has been part of the immigration laws since 1891. *Jordan v. De George*, 341 U.S. 223, 229 (1951) (noting that the term first appeared in the Act of March 3, 1891, 26 Stat. 1084). The Board of Immigration Appeals (BIA) has explained that moral turpitude “refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Matter of Franklin*, 20 I&N Dec 867,868 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995). The BIA has further held that “[t]he test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind. An evil or malicious intent is said to be the essence of moral turpitude.” *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980) (internal citations omitted).

When determining whether a crime involves moral turpitude, the statute under which the conviction occurred controls. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989). If the statute defines a crime “in which turpitude necessarily inheres,” then a conviction under that statute constitutes a crime involving moral turpitude. *Id.* Where the statute includes offenses that both do and do not involve moral turpitude, we must look to the record of conviction to determine whether the crime committed involved moral turpitude. *Id.* The record of conviction includes the indictment or charging documents, plea, verdict and sentence. *Id.* at 137-38.

The Petitioner's Convictions for Assault and Battery are for Crimes Involving Moral Turpitude

Copies of records from the Trial Court of Massachusetts, District Court Department show that on March 26, 1997, the petitioner was judged guilty and convicted of two counts of assault and battery for offenses committed on October 20, 1996 and December 16, 1996. The court sentenced the petitioner to two months of probation for each offense and ordered the petitioner to attend and complete a batterer treatment program. The criminal complaint for the December 16, 1996 offense states:

on DECEMBER 16, 1996 [the petitioner] did, by means of a dangerous weapon, a PHONE, assault and beat [his wife], in violation of G.L. c.265, §15A(b). (PENALTY: state prison not more than 10 years; or jail not more than 2 ½ years; or not more than \$1,000.)

The complaint includes a handwritten notation, “amended to A&B 3/26/1997 [illegible initials].” Accordingly, although the petitioner was charged with assault and battery with a dangerous weapon, the petitioner was convicted of the amended charge of assault and battery against his wife under Chapter 265, section 13A(b) of the Massachusetts General Laws for the December 16, 1996 offense. The petitioner did not submit the criminal complaint for his October 20, 1996 offense and the conviction records submitted do not state the victim of that offense. However, the petitioner states in his June 8, 2005 affidavit that this incident also involved his actions against his wife.

Massachusetts law proscribes assault and battery as follows:

Assault or assault and battery; punishment

- (a) Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than 2 ½ years in a house of correction or by a fine of not more than \$1,000.

* * *

- (b) Whoever commits an assault or an assault and battery:

- (i) upon another and by such assault and battery causes serious bodily injury;

(ii) upon another who is pregnant at the time of such assault and battery, knowing or having reason to know that the person is pregnant; or

(iii) upon another who he knows has an outstanding temporary or permanent vacate, restraining or no contact order or judgment issued pursuant to section 18, section 34B or 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A, or section 15 or 20 of chapter 209C, in effect against him at the time of such assault or assault and battery; shall be punished by imprisonment in the state prison for not more than 5 years or in the house of correction for not more than 2 ½ years, or by a fine of not more than \$5,000, or by both such fine and imprisonment.

(c) For the purposes of this section, “serious bodily injury” shall mean bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

Mass. Gen. Laws Ann. Ch. 265 § 13A (West 2006).

Because the Massachusetts General Laws prescribe the penalty for, but do not define the crime of assault and battery, the offense is consequently defined by common law. *Commonwealth v. Slaney*, 185 N.E.2d 919, 922 (Mass. 1962). The Massachusetts Supreme Judicial Court has defined “assault and battery” as “the intentional and unjustified use of force upon the person of another, however slight, or the intentional doing of a wanton or grossly negligent act causing personal injury to another.” *Commonwealth v. Campbell*, 226 N.E.2d 211, 218 (Mass. 1967) (quoting *Commonwealth v. McCan*, 178 N.E. 633, 634 (Mass. 1931)).

For immigration purposes, assault crimes may or may not involve moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). The First Circuit Court of Appeals, in which this petition arose, and the BIA have held that assault crimes with an aggravating dimension explicit in the statute of conviction will involve moral turpitude. *Nguyen v. Reno*, 211 F.3d 692, 695 (1st Cir. 2000); *Fualaau*, at 477-78. In this case, the petitioner’s convictions under section 13A(b) of the Massachusetts statute involve moral turpitude. While the criminal records do not state under which sub-subsection the petitioner was convicted, all of the conduct prohibited under section 13(A)(b) involves an aggravating dimension: serious bodily injury, injury of a woman known to be pregnant and assault against a person known to be protected by a restraining or no contact order. Mass. Gen. Laws Ann. Ch. 265 § 13A(b) (West 2006). *Cf. Matter of Vargas*, 23 I&N Dec. 651, 654-55 (BIA 2004) (although conviction record did not specify under which subsection the alien was convicted, the alien was removable because both subsections of the state statute were crimes of violence for immigration purposes).

On appeal, counsel claims that the petitioner was not convicted of a crime of moral turpitude because assault and battery under the Massachusetts statute requires no evil intent and may be committed by only wanton or reckless conduct. We disagree. In general, moral turpitude will not inhere where an offense requires only criminal negligence. *Matter of Perez-Contreras*, 20 I&N Dec. 615, 618-19 (BIA

1992). However, an offense that lacks a specific intent will involve moral turpitude if it requires at least deliberate, reckless conduct combined with an aggravating factor. *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996) (domestic partner as victim); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (peace officer as victim); *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976) (use of a deadly weapon). *Cf. Perez-Contreras*, 20 I&N Dec. at 619. A conviction for assault and battery under Massachusetts law cannot be secured without showing the defendant's intent to commit the assault and battery. *Commonwealth v. DiMonte*, 692 N.E. 2d 45, 52 (Mass. 1998). To constitute assault and battery under Massachusetts law, wanton and reckless conduct must be intentional conduct involving a high degree of likelihood that substantial harm will result to another. *Campbell*, 226 N.E.2d at 218-19. The petitioner was convicted of two counts of assault and battery under section 13A(b) of the Massachusetts statute, which contains explicit aggravating dimensions and for which at least intentional and reckless conduct is required for conviction. Accordingly, the petitioner was convicted of two crimes involving moral turpitude.

Favorable Exercise of Discretion Not Warranted under Section 204(a)(1)(C) 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) or deportability under section 237(a) shall not bar the Attorney General from finding the petitioner to be of good moral character under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty.

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 does not establish that the petitioner's convictions for domestic violence were connected to his wife's battery or extreme cruelty.

The statute and regulations do not define what constitutes a connection between a self-petitioner's crime and his or her subjection to battery or extreme cruelty. However, Citizenship and Immigration Services (CIS) policy guidance states:

In order for an act or conviction to be considered sufficiently "connected" to the battering or extreme cruelty, the evidence must establish that the battering or extreme cruelty experienced by the self-petitioner compelled or coerced him/her to commit the act or crime for which he/she was convicted. In other words, the evidence should establish that the self-petitioner would not have committed the act or crime in the absence of the battering or extreme cruelty.

William R. Yates, CIS Assoc. Dir., Operations, *Determinations of Good Moral Character in VAWA-Based Self-Petitions*, 3, (Jan. 19, 2005)

In his June 8, 2005 affidavit submitted on appeal, the petitioner states that his convictions arose from arguments with his wife during which he was forced to defend himself. The petitioner states that five days after the second incident, on December 21, 1996, his wife attacked him with a letter opener. The petitioner further reports that his wife had a drug problem and he was always in fear of what she might do to him because she had no control over her actions when she was under the influence of drugs. The petitioner explains, "I plead guilty because I was trying to resolve the issues with my wife and was told that if I went to a program which I completed, it would help resolve the problems with my wife." The petitioner does not specify what particular "problems with his wife" he hoped to resolve.

The record confirms that the petitioner's wife was convicted of assault and battery against the petitioner with a dangerous weapon, a letter opener, on December 21, 1996. Yet the petitioner submitted no corroborative evidence that he acted in self-defense during the incidents leading to his own convictions for assault and battery (at least one of which was against his wife, according to the conviction record). The petitioner submitted no evidence, for example, that he asserted self-defense in his criminal proceedings, but was impeded by cultural or linguistic barriers or other significant pressures.

Contrary to counsel's claim, the director's finding that the petitioner's wife battered or subjected the petitioner to extreme cruelty is not inconsistent with the director's determination that no connection existed between the petitioner's own convictions and his wife's abuse. Indeed, the record indicates that the petitioner and his wife had a mutually combative relationship in which the petitioner was the primary aggressor. Just two days after she attacked the petitioner with a letter opener, the petitioner's wife obtained a no abuse and no contact order against the petitioner from the Trial Court of Massachusetts on December 23, 1996 that expired on December 23, 1997. The record is devoid of any evidence that the petitioner challenged the order, that the order was withdrawn or modified prior to its expiration date, or that the petitioner himself ever procured a protection order against his wife. Despite the petitioner's assertions on appeal, the documentary evidence does not show a connection between the petitioner's convictions and his wife's battery. The petitioner's affidavit alone does not establish that his wife's abuse compelled or coerced the petitioner to commit his own crimes of assault and battery against her. Accordingly, the petitioner does not warrant a discretionary finding of good moral character pursuant to section 204(a)(1)(C) of the Act.

The present record does not establish that the petitioner is a person of good moral character. He is thus ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that CIS 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 his 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.