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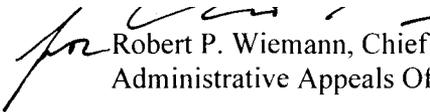
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Immigration and Nationality Act (“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 finding that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his former spouse during their marriage, that he is a person of good moral character, and that he entered into his marriage in good faith.

The petitioner submits a timely appeal.

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, 8 U.S.C. § 1154(a)(1)(J), 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:

(v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.

(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 . . . spouse, 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 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.

\* \* \*

(ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

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.

\* \* \*

(iii) *Residence*. One or more documents may be submitted showing that the self-petitioner and the abuser have resided together . . . . Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(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. 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.

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(vii) *Good faith marriage*. Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children

born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Canada who was admitted to the United States on January 4, 2004 as a B-1 nonimmigrant visitor.<sup>1</sup> On March 3, 2002, the petitioner married M-B-<sup>2</sup> a United States citizen, in Nevada. On March 10, 2004, M-B- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf. The petitioner concurrently filed a Form I-485, Application to Adjust Status, on that same date. M-B- withdrew the Form I-130 and the Form I-485 was subsequently denied on December 23, 2004. On March 15, 2006, Citizenship and Immigration Services (CIS) issued a Notice to Appear (NTA) to the petitioner charging him as removable under section 237(a)(1)(B)(i) of the Act for remaining in the United States beyond his period of lawful admission and under section 237(a)(2)(A)(i) for having been convicted of a crime involving moral turpitude within five years after admission for which a sentence of one year or longer may be imposed. The petitioner was ordered removed on February 14, 2008.

The petitioner filed the instant Form I-360 on January 25, 2005. The director issued a Request for Evidence (RFE) on February 1, 2005 of the petitioner's good moral character. The petitioner responded on April 1, 2005 by submitting additional evidence and requesting more time to submit further evidence. On June 28, 2006, the director granted the petitioner's request for additional time and also requested further evidence to support the petitioner's claim of residence, good faith marriage, abuse, and, again, good moral character. The petitioner responded to the director's request on August 24, 2006 and, again, requested additional time to respond to the director's request. The director issued a Notice of Intent to Deny (NOID) the petition on September 27, 2006, that notified the petitioner of the deficiencies in the record and afforded him the opportunity to submit further evidence to establish, *inter alia*, that he resided with his former spouse, was battered or subjected to extreme cruelty by his former spouse during their marriage, that he is a person of good moral character, and that he entered into his marriage in good faith. The petitioner responded to the NOID on November 24, 2006 with additional evidence. After considering the evidence in the record, including the evidence submitted in response to the NOID, the director denied the petition on March 6, 2007.<sup>3</sup>

The petitioner submits a timely appeal with additional evidence and requests oral argument before the AAO. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, the AAO has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the petitioner

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<sup>1</sup> The petitioner had previously been admitted into the United States but was granted voluntary departure after being found removable on May 13, 2003.

<sup>2</sup> Name withheld to protect individual's identity.

<sup>3</sup> We note that the petitioner and M-B- are no longer married. Their divorce became final on October 2, 2006. (Superior Court of California, County of San Diego, Case No.: [REDACTED]).

has identified no unique factors or issues of law to be resolved. The written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied. As will be discussed, we concur with the findings of the director that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his former spouse during their marriage, that he is a person of good moral character, and that he entered into his marriage in good faith.

*Battery or Extreme Cruelty*

In his January 15, 2005 statement, the petitioner describes his former spouse as being a prostitute who is dependent on drugs and alcohol. He claims that on two separate occasions, he was assaulted by his former spouse's friends. In the first instance, the petitioner claims that he defended himself against five attackers. In the second incident, the petitioner claims that his former spouse's boyfriend, S-K-,<sup>4</sup> beat him over the head with a crowbar. The petitioner further claims that he was "vandalized, stolen from, constantly lied to, and . . . the victim of credit card fraud," but does not elaborate on this statement or provide specific examples. Finally, the petitioner claims that his former spouse and her boyfriend made false accusations against him on two occasions. In his November 22, 2006 statement, the petitioner reiterates the claims made in his January 15, 2005 statement.

The petitioner also submitted letters from his former defense attorney and acquaintances. The petitioner's former attorney, Barton C. Sheela, states that the petitioner's former spouse and her boyfriend "cooked up" stories about the petitioner so that they could "continue to live together without [the petitioner] being around." Mr. [REDACTED] provides reports based on statements taken for an investigation conducted as part of his representation of the petitioner for one of his criminal cases. The first statement in the investigative report involves an interview with [REDACTED], a neighbor of the petitioner and his former spouse. In her interview, [REDACTED] Schmidt stated that she had once seen "visible bruises" on the petitioner's former spouse and that the petitioner's former spouse indicated that the petitioner caused the bruises. [REDACTED] describes another incident in which the petitioner came "banging on her door" at 4:00 a.m. with blood all over him. [REDACTED] reported that:

[The petitioner] told her he walked in on [his former spouse] naked with a bunch of guys; [REDACTED] believed they were . . . friends who may have stayed, taking pictures. Schmidt said [the petitioner] told her he told the guys to all leave and they beat him up.

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Schmidt informed me she realizes [the petitioner] has had a difficult time with [his former spouse]. She indicated the two of them did fight. Schmidt said [the petitioner] was always worried about [his former spouse], panicking when she

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<sup>4</sup> Name withheld to protect individual's identity.

would disappear several days in a row. She said at some point it was discovered that [the petitioner's former spouse] was not really a massage therapist, but a stripper and prostitute.

The remaining statements compiled for the investigative report offer similar descriptions of the petitioner's former spouse's drug use and alleged lies.

The statements submitted on the petitioner's behalf by his acquaintances also discuss the petitioner's former spouse's alleged drug use, the allegedly false reports made against the petitioner by his former spouse, and the two incidents where the petitioner was purportedly assaulted by his former spouse's friends.

Upon review, we do not find the evidence submitted by the petitioner and on his behalf is sufficient to demonstrate that he was battered or subjected to extreme cruelty during his marriage. First, the petitioner does not allege that he was threatened or actually physically harmed by his former spouse. Although the petitioner alleges that he was beaten up by friends of his former spouse and that his former spouse was present during the assault, the petitioner has not established that his former spouse instigated or was otherwise a proximate cause of the alleged abuse. In fact, the first incident, as described by [REDACTED], indicates that the petitioner was assaulted by acquaintances of his former spouse because the petitioner asked them to leave his home. She further indicated that "one of the guys may have wanted [the petitioner's former spouse] . . . and [the petitioner] ended getting beat up and all bloodied." Both the statute and the regulation require that the abuse be perpetrated against the petitioner *by his or her spouse*, not a third party. See Section 204(a)(1)(A)(iii)(I)(bb) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(bb), 8 C.F.R. § 204(c)(1)(vi).

The petitioner's claims regarding false statements being made against him are equally insufficient. The first incident claimed by the petitioner relates to his April 2, 2004 arrest for domestic violence. Although the petitioner claims that the charges against him were dropped, the record only contains evidence of the dismissal of the protective order against the petitioner.<sup>5</sup> The second incident involved the event on October 1, 2004 where the petitioner was initially charged with assault with a deadly weapon. The record reflects that ultimately, the petitioner pled guilty to and was convicted of false imprisonment under sections 236 and 237 of the California Penal Code (CPC). On appeal, the petitioner indicates that he "was not happy with" his defense attorney's advice to plead no contest to the charges, but provides no explanation for his decision to plead guilty to charges he claims were false.

As discussed above, the testimony regarding the petitioner's former spouse's non-physical behavior does not indicate that her actions were coercive, threatened harm or were aimed at ensuring dominance or control over the petitioner. As such, the petitioner's claims, including the claims that

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<sup>5</sup> April 21, 2004 Reporter's Transcript of Proceedings, Superior Court of the State of California, County of San Diego, East County Division, No. E [REDACTED]

his former spouse was a prostitute and that she was dependent on drugs and alcohol, do not rise to the level of extreme cruelty as those acts are described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi) which include forceful detention, psychological or sexual abuse or exploitation, rape, molestation, incest, or forced prostitution. Accordingly, we concur with the findings of the director that the petitioner failed to establish that he was battered or subjected to extreme cruelty by his former spouse during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

*Good Faith Entry into Marriage*

At the time of filing, the petitioner submitted a letter dated January 15, 2005 in which he generally states that he married M-B- in good faith. The statement, however, does not contain any discussion regarding how the petitioner met his former spouse, their courtship, his feelings for his former spouse or reasons for marrying her and offers no details of their life together after their marriage except as it relates to the claimed abuse. The petitioner's November 22, 2006 letter, submitted in response to the director's NOID, offers no further probative details regarding the petitioner's alleged good faith in entering his marriage. Although the petitioner also submitted numerous letters from acquaintances, the majority of the letters refer only to the alleged abuse. The remaining letters from [REDACTED], and [REDACTED] contain only general statements regarding the petitioner's relationship with his former spouse, such as describing seeing them at the gym together and visiting with them on occasion. However, the letters provide no probative details regarding the petitioner's relationship with his former spouse and interactions with each other, and provide only vague statements such as that they were like "any newly married couple," they "had deep feelings" for each other, and "they announced themselves as husband and wife." We additionally note the investigative statement taken from the petitioner's neighbor [REDACTED] who stated that the petitioner met his former spouse "some time in 2001 and got 'married overnight in 2002.'"

As documentary evidence, the petitioner submitted information from Farmers Insurance which demonstrates that the petitioner and his former spouse shared an automobile insurance policy. The petitioner also submitted a San Diego County Treasurer-Tax Collector letter dated January 10, 2005 notifying the petitioner and his former spouse that they were delinquent in paying their tax bill and a final notice letter from Viterra Energy Services, dated December 6, 2004 to the petitioner's former spouse only. These latter two documents, however, are dated after the petitioner claims to have stopped residing with his former spouse. The petitioner also submitted two, undated, uncaptioned photographs. Despite a claimed relationship of more than two years, the petitioner provides no other photographs of shared events or special occasions either prior to or after their marriage or other documentary evidence of joint assets and liabilities such as shared financial accounts, utilities, or life or health insurance. Although the lack of documentary evidence of a good faith marriage is not automatically disqualifying, as discussed above, the testimonial evidence submitted by the petitioner does not establish that he entered into the marriage in good faith.

On appeal, the petitioner states that his “intentions of being married were of good intentions [and] good faith,” and refers to his marriage certificate and joint residence as being evidence of his good faith marriage. He does not, however, provide any further testimonial or documentary evidence to support his claim.

As discussed above, the sole, relevant documentary evidence is the joint automobile insurance. The testimonial evidence submitted by the petitioner and on his behalf lacks probative detail about the petitioner’s relationship and interactions with his former spouse, such as shared events, joint finances or utilities. Although the petitioner submitted a letter from [REDACTED], his tax accountant, who stated that he consulted with the petitioner and his former spouse about their “tax affairs,” neither the petitioner nor [REDACTED] provides any testimonial evidence regarding the former couple’s joint filing of taxes. Further, the record contains no documentary evidence of the filing of any taxes during their marriage or the filing status indicated, such as married filing jointly or married filing separately. Accordingly, the petitioner failed to demonstrate that he entered into marriage with his former spouse in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

*Good Moral Character*

The regulation at 8 C.F.R. § 204.2(c)(1)(vii) states, in pertinent part, “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.” Section 101(f) of the Act, 8 U.S.C. § 1101(f), 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 –

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(3) a member of one or more of the classes of persons, whether inadmissible or not, described in . . . subparagraph [h] (A) . . . of section 212(a)(2) and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of thirty grams or less of marijuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

\* \* \*

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)) [.]

\* \* \*

Section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), describes, in pertinent part:

[A]ny alien convicted of . . .

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802))[]

Further, section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C) states:

Controlled Substance Traffickers

Any alien who the consular officer or [Secretary of Homeland Security] knows or has reason to believe -

- (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so . . . .

The petitioner's criminal history and arrest record in this case is lengthy. Although far from complete, as will be discussed, the relevant documentation demonstrates an extensive record with law enforcement both in the United States and Canada. The record contains various arrest reports, court transcripts, and docket sheets, but the petitioner fails to provide comprehensive documentation of the final dispositions of all his criminal charges, despite the director's specific requests in the two RFEs and NOID.

The record contains the following documents related to the petitioner's criminal history:

*I. Police Reports*

*1. San Diego Regional Crime/Incident Report #*

The report, dated April 3, 2004, indicates that the petitioner shoved his former spouse during a verbal argument. The report documents that the petitioner's former spouse had a black eye and scratches on her left forearm. The petitioner was arrested for Willful Infliction of Corporal Injury under section 273.5 of the California Penal Code (CPC). The petitioner claims on appeal that he had a domestic violence case dismissed against him on April 21, 2004. The corresponding court transcript records the dismissal of a restraining order against the petitioner and references his former spouse's "paperwork" regarding an incident on April 1, 2004 in which the petitioner's former spouse sustained a black eye and a "grab mark" on her wrist. However, we cannot conclude that this transcript corresponds to the April 3, 2004 police report because the report lists the incident date as March 31, 2004, not April 1, 2004 and the transcript contains no case number or other identifier that specifically corresponds to the

April 3, 2004 police report. If the petitioner was convicted under section 273.5 of the CPC, he would be considered to have been convicted of a crime involving moral turpitude. *Grageda v. INS*, 12 F.3d 919 (9<sup>th</sup> Cir. 1993)(conviction for spousal abuse under section 273.5(a) of the C.P.C. is a crime involving moral turpitude); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988).

2. *San Diego Police Department Narcotic Impound Document (HQ) – [number indecipherable]*

This document, dated March 15, 2006, indicates that the petitioner was arrested for violating section 1203.2(a) of the CPC. The report states that the petitioner had a prescription bottle with 1.4 grams of marijuana and a bag with 5.1 grams of marijuana. Section 1203.2(a) of the CPC states that if at any time during a person’s probationary period, an officer has reasonable cause to believe that the person is violating the terms of his or her probation, the officer may rearrest the person. The petitioner submits no testimonial or documentary evidence to explain the circumstances surrounding this arrest and its final disposition.

II. *Documents from the Superior Court of California, San Diego County*

1. *Case No.:* [redacted]

The record reflects that on December 9, 1997, the petitioner was charged with Spousal Abuse and Vandalism: Less than \$400, under sections 273.5(a); 594(a), (b)(4) of the CPC.<sup>6</sup> On December 19, 1997, the judge accepted the petitioner’s plea of guilty for Battery under sections 242 and 243(a) of the CPC and Malicious Mischief under section 594(a), (b)(4) of the CPC (1997). The petitioner was sentenced to 50 days in the custody of the sheriff, probation, restitution, court costs and a fine.

Battery, as defined by section 242 of the CPC, is “any willful and unlawful use of force or violence upon the person of another” (Cal. Penal Code Ann. § 242 (West 1997)) and requires no specific intent to injure another person. *Galeana-Mendoza v. Gonzalez*, 465 F.3d 1054, 1059 (9<sup>th</sup> Cir. 2006); *In Re Sanudo*, 23 I&N Dec. 968, 969 (BIA 2006). Section 243(a) of the CPC merely prescribes the punishment for battery and adds no substantive element to the crime. Cal. Penal Code Ann. § 243(a)(West 1997). Accordingly, battery under sections 242 and 243(a) of the CPC lacks the injurious intent or other aggravating factors increasing the offender’s culpability such that the crime would involve moral turpitude. *Galeana-Mendoza v. Gonzalez*, 465 F.3d at 1060; *In Re Sanudo*, 23 I&N Dec. at 969-73 (BIA 2006). Therefore, the petitioner’s conviction under sections 242 and 243(a) of the CPC is *not* a crime involving moral turpitude. See *Galeana-Mendoza v. Gonzalez*, 465 F.3d at 1058-1061; *In Re Sanudo*, 23 I&N Dec. at 971-73 (BIA 2006).

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<sup>6</sup> Criminal Complaint VN-5292, Municipal Court of California, County of San Diego, San Diego Judicial District, Case Number [redacted]

However, as it relates to the petitioner's vandalism conviction, section 594(a) of the CPC states, in pertinent part:

Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism [.]

Cal. Penal Code Ann. § 594(a) (West 1997).

The BIA has found instances where malicious destruction of property does not contain acts so base or vile as to find moral turpitude. However, in those instances, the statutes were divisible and encompassed offenses which both did and did not involve moral turpitude. *Matter of N-*, 8 I&N Dec. 466 (BIA 1959) (absent proof of intent, Delaware conviction for malicious mischief did not necessarily involve moral turpitude); *Matter of C-*, 2 I&N Dec. 716 (BIA 1946) (Canadian conviction for malicious mischief and damaging private property did not involve moral turpitude because offense did not contain a requirement of malicious intent); *Matter of B-*, 2 I&N Dec. 867 (BIA 1947) (Canadian conviction for malicious mischief wherein intent may have been negligent or reckless did not involve moral turpitude). As cited above, however, section 594(a) of the CPC is not divisible. Rather, the statute requires a finding that the petitioner *maliciously* defaced, damaged, or destroyed the property of another person. Accordingly, we find that the petitioner's conviction under section 594(a) of the CPC was a conviction of a crime involving moral turpitude. See *Matter of M-*, 3 I&N Dec. 272 (BIA 1948) (finding crime of malicious destruction of property to be a crime involving moral turpitude due to malicious intent required by statute).

2. Case No.: [REDACTED]

The petitioner was charged under section 242 of the CPC for an incident that occurred on May 4, 2004. The petitioner's former spouse failed to appear for trial on July 7, 2004 and the charge and protective order were dismissed.<sup>7</sup>

3. Case No. [REDACTED]

The petitioner's former spouse alleged that on October 1, 2004, the petitioner attempted to hit her and S-K- with a vehicle. The petitioner was arrested on October 7, 2004 for Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, under section 245(a)(1) of the CPC.<sup>8</sup> Charges were filed against the petitioner on December 7, 2004.<sup>9</sup> On March 10, 2005 the petitioner pled guilty to

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<sup>7</sup> Miscellaneous & Trial Minutes, Superior Court of California, County of San Diego, East County Division, Case Number [REDACTED]

San Diego Regional Crime/Incident Report, case number [REDACTED]

<sup>9</sup> Charge Summary, Superior Court of California, County of San Diego, East County Division, Court Number S [REDACTED]

False Imprisonment under sections 236 and 237 of the CPC.<sup>10</sup> On April 13, 2005, the petitioner received a suspended sentence, three years probation, restitution, a fine and court costs.<sup>11</sup> The petitioner was also ordered to complete a 52-week domestic violence program.<sup>12</sup> On appeal, the petitioner submits evidence that his probation was terminated on July 17, 2007. In conjunction with this arrest, the petitioner was also charged with willfully disobeying a court order under section 166(a)(4) of the CPC.<sup>13</sup> That charge and corresponding protective order were also dismissed on March 10, 2005.<sup>14</sup>

5. Case No. [REDACTED]

On June 16, 2005, the petitioner was charged with Unauthorized Possession under section 11377(B)(1) of the California Health and Safety Code (CHSC) and with Possession of Needle or Syringe, and Possessing Drugs Without a Prescription under sections 4140 and 4060 of the California Business and Professions Code (CBP).<sup>15</sup> On August 8, 2005, the petitioner pled no contest to violating section 11377(B)(1) of the CHSC and was granted deferred entry of judgment under section 1000.1 of the CPC.<sup>16</sup> Although the petitioner was charged with first-time possession of steroids, the record contains no evidence that the disposition of his offense was analogous to treatment under the Federal First Offender Act (FFOA) such that his crime could not be considered a conviction under section 101(a)(48)(A) of the Act. *See Lujan Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000). Specifically, the petitioner's Canadian conviction (discussed below) indicates that he may not meet two of the criteria required to merit lenient treatment of his offense. *See Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 (9<sup>th</sup> Cir. 2000)(listing requirements for first offender treatment under federal law).

The record shows that the petitioner pled no contest to the charge and was ordered to attend a drug treatment program, which he failed to complete. The petitioner submitted no evidence that the charge was dismissed pursuant to section 1000.1(a)(3) of the CPC. Accordingly, the record indicates that the deferred adjudication of the petitioner's violation of section 11377(b)(1) of the CHSC is a conviction for immigration purposes pursuant to section 101(a)(48)(A) of the Act. *See Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1291-92 (9<sup>th</sup> Cir. 2004) (declining to extend *Lujan* to situations where an alien's

<sup>10</sup> Referral to Probation, Superior Court of California, County of San Diego, S [REDACTED]

<sup>11</sup> Superior Court of California, County of San Diego, Criminal Minutes – Pronouncement of Judgment and Order Granting Probation, Case Number [REDACTED]

<sup>12</sup> *Id.*

<sup>13</sup> December 7, 2004, Reporter's Transcript of Proceedings, Superior Court of California, County of San Diego.

<sup>14</sup> Pre-Disposition Minutes, Case No. [REDACTED] Superior Court of California, County of San Diego, East County Division.

<sup>15</sup> Criminal Complaint WZ9982, Superior Court of California, County of San Diego.

<sup>16</sup> Superior Court of California, County of San Diego, Case Number [REDACTED], Plea of No Contest and Pre-Disposition Minutes.

conviction might, but had not actually been expunged pursuant to successful completion of probation).

### III. Canadian Criminal History

#### I. Case No.:

The Quebec Province Criminal Information and Summons in the record for the petitioner's Canadian conviction states that in "November 1987 . . . [the petitioner] sold anabolic steroids (testosterone), thus committing a criminal act under sections 26 and 15 of the Food and Drugs Act and its regulations." The record further demonstrates that the petitioner was convicted on October 6, 1989 under these sections of Canadian law and was granted a suspended sentence and placed on probation for one year. Participation in illicit drug trafficking is a crime involving moral turpitude. *Matter of Khourn*, 21 I&N Dec. 1041, 1046-47 (BIA 1997) (distribution of a controlled substance is a crime involving moral turpitude). In this instance, the record shows that the petitioner was convicted of the actual sale of anabolic steroids, a controlled substance. In addition, the petitioner's offense is also a violation of a law of a foreign country relating to a controlled substance, as described in section 212(a)(2)(A)(II) of the Act.

Moreover, the petitioner's conviction is an aggravated felony. Section 101(a)(43)(B) of the Act defines an aggravated felony, in part, as: "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." Under the phrase "illicit trafficking in a controlled substance," a state drug crime is an aggravated felony "if it contains a trafficking element." *Rendon v. Mukasey*, - F.3d -, 2008 WL 726354 (9<sup>th</sup> Cir. 2008)(citing *Salviejo-Fernandez*, 455 F.3d 1063, 1066 (9<sup>th</sup> Cir. 2006)). The petitioner was convicted for the sale of a controlled substance, a trafficking element that renders his crime an aggravated felony. Because the petitioner was convicted in 1989, however, we are precluded from finding that his aggravated felony bars a determination of his good moral character pursuant to section 101(f)(8) of the Act. *See I.N.S. Office of the General Counsel, Opinion 96-16*, Dec. 3, 1996.

The date of the petitioner's conviction does not, however, bar a finding that the petitioner was an illicit trafficker in a controlled substance under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), which states, in pertinent part that an alien is inadmissible if a "consular officer or the [Secretary of Homeland Security] knows or has reason to believe [that the alien] is or has been an illicit trafficker in any controlled substance . . . ." As the petitioner falls under section 212(a)(2)(C)(i) of the Act, he is precluded from establishing his good moral character pursuant to section 101(f)(3) of the Act.

Although the petitioner's conviction occurred in 1989, long before this petition was filed, the statute does not prescribe a specific time period during which good moral character must be established. *See* Section 204(a)(1)(A)(iii)(II)(bb) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb). Accordingly, we may examine a petitioner's conduct beyond the three years preceding the filing of the petition

when there is reason to believe that the petitioner may not have been a person of good moral character in the past. *See Preamble to Interim Rule*, 61 Fed. Reg. 13061, 13066 (Mar. 26, 1996) (explaining the scope of the inquiry into a petitioner's moral character).

While we acknowledge the petitioner's submission of a document which indicates that he received a pardon from the National Parole Board under the Criminal Records Act on June 26, 1996, he has submitted no evidence to establish that this pardon relates to the October 6, 1989 conviction. Moreover, even if the petitioner established that he was pardoned for this conviction, for immigration purposes, the pardon has no effect on his conviction. *Mullen-Cofee v. INS*, 976 F.2d 1375, 1379 (11<sup>th</sup> Cir. 1992); *Marino v. INS*, 537 F.2d 686, 691 (2d Cir. 1976); *Matter of F- Y- G-*, 4 I&N Dec. 717 (BIA 1952).

#### IV. Statutory and Discretionary Bars

The record reflects that the petitioner has been convicted of at least two crimes involving moral turpitude which prohibit a finding of the petitioner's good moral character under section 101(f)(3) of the Act. Notwithstanding this statutory bar, the petitioner also fails to demonstrate that he warrants a discretionary finding of good moral character. Section 204(a)(1)(C) of the Act grants CIS the discretion to find a petitioner to be a person of good moral character 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 former spouse or parent. While section 212(a)(2)(A)(ii)(II) of the Act provides an exception to the classification of an alien as one convicted of a crime involving moral turpitude it only applies to aliens who have been convicted of *one crime*, for which the maximum possible penalty does not exceed one year of imprisonment and the alien was not sentenced to a term of imprisonment exceeding six months. In this instance, the petitioner has been convicted of *at least* two crimes involving moral turpitude. Accordingly, section 212(a)(2)(A)(ii)(II) of the Act is inapplicable to the petitioner's case. Further, the record does not establish that the petitioner's convictions were connected to his former spouse's battery or extreme cruelty. As discussed previously in this decision, the petitioner has failed to establish the requisite battery or extreme cruelty. Moreover, as the petitioner's conviction in Canada took place nearly thirteen years prior to his marriage, he has failed to establish a connection between that conviction and his former spouse's purported battery or extreme cruelty. Accordingly, we find that section 204(a)(1)(C) of the Act is inapplicable to the petitioner's two known convictions for crimes involving moral turpitude.

Finally, even if the petitioner's convictions did not require an automatic finding of a lack of good moral character and we were able to waive his crimes involving moral turpitude pursuant to section 204(a)(1)(C) of the Act, we would still find the petitioner to lack good moral character pursuant to section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii). Section 101(f) of the Act indicates that even if the petitioner is not in any of the classes listed, we are not precluded from

finding the petitioner lacks good moral character. Similarly, section 204.2(c)(1)(vii) states, in pertinent part:

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.

In this case, the petitioner has a prolonged criminal history which involves numerous drug, alcohol and domestic violence related arrests and convictions. We acknowledge the petitioner's submission of evidence that he has been involved in rehabilitation programs, including domestic violence and drug treatment programs. We also acknowledge the petitioner's claim that he realizes his past mistakes, has changed the way he lives, has performed community service and attended Narcotics Anonymous meetings. However, we do not find that the petitioner has sufficiently demonstrated his rehabilitation or reform of character. We note that the petitioner's most recent arrest occurred more than six months after the filing of this petition and that there are unresolved questions regarding his current probation. The record reflects that for the majority of the time that this petition has been pending, the petitioner has been on probation for his April 13, 2005 conviction. The probation for that conviction was not terminated until July 17, 2007, more than three months after the petitioner filed the instant appeal. Moreover, it is not clear that the petitioner has completed court-imposed requirements for his other recent term of probation. Specifically, as a result of his August 8, 2005 conviction for unauthorized possession, the petitioner was ordered to complete Community Resources and Self Help (CRASH), a drug diversion program. On October 21, 2005, the court determined that the petitioner had completed 35 days of inpatient treatment and indicated that a "final review" was set for February 2, 2007. However, the record does contain a letter from Greg Rhome, Program Coordinator for CRASH, who indicates that the petitioner was "involved in a rule infraction that necessitated his leaving" the program. On appeal, although the petitioner states that he is eligible to return to the program, he does not discuss the rule infraction noted by Mr. Rhome and submits no further evidence regarding the outcome of the court's "final review."

In sum, we find that the petitioner has not established his good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act, for two reasons. First, under section 101(f)(3) of the Act, the petitioner is statutorily barred from establishing that he is a person of good moral character because of his conviction of at least one crime involving moral turpitude and because the petitioner's Canadian conviction shows that he has been an illicit trafficker in a controlled substance. Second, we find that, as a matter of discretion exercised under section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii), the petitioner has not established that he is a person of good moral character because the petitioner's criminal record and failure to complete a court-ordered drug diversion program outweigh the favorable evidence discussed above.

The petitioner has not demonstrated that his former spouse battered or subjected him to extreme cruelty during their marriage, that he entered into their marriage in good faith and that he is a person of good moral character. He is consequently ineligible for immigrant classification under section

**204(a)(1)(A)(iii) of the Act.** The petition will be denied for these three reasons, with each considered as an independent and alternative basis for denial.<sup>17</sup> 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.

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<sup>17</sup> We note that although the director made a determination regarding the petitioner's lack of credibility and found the petitioner was not credible based, in part, upon the denial of the petitioner's previously filed nonimmigrant visa petition, we do not reach a determination on these issues. Any credibility determination that involves the circumstances of the denial of the petitioner's nonimmigrant petition is more relevant to a decision regarding the petitioner's admissibility. Admissibility is not a statutory eligibility criterion for immigrant classification under section 204(a)(1)(A)(iii) of the Act.