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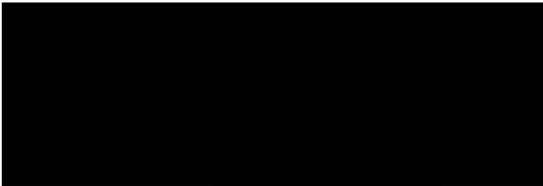
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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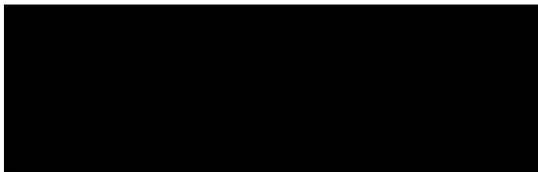


FILE: [Redacted]
EAC 06 051 52003

Office: VERMONT SERVICE CENTER

Date: JUN 05 2009

IN RE: Petitioner:



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:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 because the petitioner did not establish that he was a person of good moral character because he had been convicted of more than one crime involving moral turpitude.

On appeal, counsel submits a brief and copies of some of the relevant criminal statutory provisions. The AAO requested further evidence on March 26, 2009. Counsel did not respond to the request.

I. Pertinent Facts and Procedural History

The petitioner stated on the Form I-360 that he entered the United States in June 1972. On April 2, 1980, an immigration judge ordered the petitioner deported to Mexico. The petitioner waived appeal of the order and departed to Mexico on the same day. On May 2, 1995, the petitioner married M-T-¹, a U.S. citizen, in California. The petitioner filed the instant Form I-360 on December 5, 2005. The director subsequently issued a Notice of Intent to Deny (NOID) the petition for, *inter alia*, lack of good moral character. The petitioner submitted additional evidence in response to the NOID, which the director found insufficient to establish the petitioner’s good moral character. The director denied the petition on that ground and counsel timely appealed.

On appeal, the AAO requested further evidence regarding the petitioner’s criminal record and his moral character. The March 26, 2009 request granted the petitioner 60 days to respond. Neither counsel nor the petitioner responded to the request within the specified time. This failure to respond is thereby considered a request for a decision based on the present record. *See* 8 C.F.R. § 103.2(b)(13)(i). The petitioner has not demonstrated that he is a person of good moral character and the appeal will be dismissed for the following reasons.

II. Applicable Law

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

¹ Name withheld to protect individual’s identity.

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:

(vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. . . . A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she . . . committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community.

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

Evidence for a spousal self-petition –

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

* * *

(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.

III. The Petitioner's Criminal Record and His Lack of Good Moral Character

The record indicates that the petitioner has been convicted of the following offenses:

- 1) Burglary, in violation of section 459 of the California Penal Code (CPC). U.S. Citizenship and Immigration Services (USCIS) records indicate that the petitioner was convicted of this offense in 1976 in Los Angeles.
- 2) Breaking or Removing Vehicle Parts, in violation of section 10852 of the California Vehicle Code (CVC). USCIS records indicate that the petitioner was convicted of this offense in 1976 in Los Angeles in the same criminal proceedings as number one, above.
- 3) Malicious Mischief to Vehicle, in violation of section 10853 of the CVC. USCIS records indicate that the petitioner was convicted of this offense in 1976 in Los Angeles in the same criminal proceedings as numbers one and two, above.
- 4) Knowingly and Willfully Entering the United States Unlawfully, in violation of section 275 of the Act, 8 U.S.C. § 1325. The record contains a certified copy of the U.S. Southern District Court of California judgment on March 3, 1980 ([REDACTED]). The record further shows that the petitioner was deported to Mexico on April 2, 1980.
- 5) Battery, in violation of section 242 of the CPC. USCIS records indicate that the petitioner was convicted of this offense in Los Angeles on July 3, 1981 and sentenced to 12 months probation and ten days imprisonment. USCIS records further indicate that the petitioner's probation was terminated on December 8, 1981.
- 6) Burglary, in violation of section 459 of the CPC. The petitioner submitted court records showing that he pled guilty and was convicted of this offense on October 13, 1983. The petitioner was sentenced to 120 days of imprisonment and placed on probation, which was successfully terminated on October 23, 1996.
- 7) Driving Under the Influence of Liquor (DUI). USCIS records indicate that the petitioner was convicted of DUI on July 12, 1991 in El Paso, Texas and was sentenced to two years probation.
- 8) Driving Under the Influence of Alcohol (DUI), in violation of section 23152(A) of the CVC. The court docket for the following offense (9) alleges this prior conviction on October 16, 1998

by the Burbank, California Municipal Court, [REDACTED]

- 9) DUI, in violation of section 23152(B) of the CVC. The petitioner submitted a partial copy of the court docket for this offense [REDACTED] which shows that the Los Angeles County Superior Court of California convicted the petitioner in 2006, placed him on probation, ordered him to complete an alcohol counseling or treatment program.

A. Crimes Involving Moral Turpitude

The director determined that the petitioner had been convicted of more than one crime involving moral turpitude. The record is insufficient to support that conclusion, although the convictions adversely reflect upon the petitioner's moral character.

Section 204(a)(1)(A)(iii)(II)(bb) of the Act requires the petitioner to be a person of good moral character. Section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3), prescribes that no person shall be found to have good moral character if he or she is, in pertinent part, "a member of one or more of the classes of persons, whether inadmissible or not, described in . . . subparagraphs (A) and (B) of section 212(a)(2)" Section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), pertains to any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements 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) and the Ninth Circuit Court of Appeals, within whose jurisdiction this case arose, have described moral turpitude as "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 Olquin*, 23 I&N Dec. 896, 896 (BIA 2006); accord *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 997-98 (9th Cr. 2008). A crime involving moral turpitude must involve both reprehensible conduct and some degree of scienter, be it specific intent, deliberateness, willfulness or recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n.1, 706 (A.G. 2008).

When determining whether a crime involves moral turpitude, we must follow the Attorney General's recent decision in *Matter of Silva-Trevino*. *Id.* at 687-89. We first examine the statute of conviction. *Id.* at 696; *Matter of L-V-C-*, 22 I&N Dec. 594, 603 (BIA 1999); *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989). If there is no realistic probability that the statute of conviction has been applied to conduct that does not involve moral turpitude, then convictions under the statute may categorically be treated as crimes involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. at 697. Such a

² The petitioner's discharge summary from his alcoholism treatment at Life's Journey Center cites the petitioner as reporting that he had "two DUIs, one in 1998 and the second one in 2005."

realistic probability exists when there is an actual case in which the criminal statute was applied to conduct that did not involve moral turpitude. *Id.* Where the alien bears the burden of proof to establish eligibility for the benefit sought, the alien also bears the burden of showing that the criminal statute has been applied to conduct that did not involve moral turpitude. *Id.* at 703 n.4.

On appeal, counsel contends that the petitioner's 1976 convictions (numbers 1 and 2 above) are not crimes involving moral turpitude because the California statutes of conviction are divisible and the petitioner submitted a letter from the court stating that the records of the petitioner's case have been destroyed. Counsel further claims that the petitioner's conviction for malicious mischief to a vehicle (number 3 above) is not a crime involving moral turpitude under *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995). However, counsel has not met his burden of proof to show that the petitioner's first three crimes did not involve moral turpitude. Counsel also does not address the petitioner's conviction for battery in 1981.

The petitioner's convictions numbered 1 through 3, 5 and 6 were secured under divisible statutes. We agree with counsel that burglary under CPC § 459 (numbers 1 and 6) and breaking or removing vehicle parts under CVC § 10852 (number 2) are divisible. In addition, both the BIA and the Ninth Circuit have found that battery at CPC § 242 (number 5) is a divisible statute. *Matter of Sanudo*, 23 I&N Dec. 968, 970-73 (BIA 2006); *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1057-58 (9th Cir. 2006).

Malicious mischief to a vehicle under CVC § 10853 (number 3) is also divisible. Counsel's reliance on *Rodriguez-Herrera v. INS* is misplaced as that case concerned malicious mischief under section 9A.48.080(1)(a) of the Revised Code of Washington and the court relied on Washington's specific definition of malice at section 9A.04.110(12) of the Washington code to find that the crime did not involve moral turpitude. *Rodriguez-Herrera v. INS*, 52 F.3d at 239-41. The *mens rea* of malicious mischief to a vehicle under CVC § 10853 is much broader than that of the Washington offense and counsel has presented no analysis of why this offense categorically does not involve moral turpitude.

In general, we must apply the law in effect at the time of our decision. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994). Under *Silva-Trevino*, the petitioner bears the burden of proof to present evidence of actual cases in which sections 242 and 459 of the CPC, and sections 10852 and 10853 of the CVC have been applied to conduct which did not involve moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. at 703 n.4. Because *Silva-Trevino* was issued after counsel filed his brief on appeal, we granted the petitioner an opportunity to submit such evidence. The petitioner did not avail himself of that opportunity.

The petitioner did, however, previously submit evidence that the court records for his 1976 burglary and vehicular offenses (numbers 1 through 3) were destroyed and that no court record exists for his 1996 burglary conviction (number 6). The petitioner submitted no record of conviction for his 1981 battery offense (number 5). The record is consequently insufficient to determine whether or not these five convictions (numbers 1, 2, 3, 5, 6) were for crimes involving moral turpitude. Nonetheless, the petitioner's lengthy criminal record indicates that he lacks good moral character for

other reasons, as discussed below.

B. The Petitioner Lacks Good Moral Character

Primary evidence of a self-petitioner's good moral character is his or her affidavit. 8 C.F.R. § 204.2(c)(2)(v). The petitioner submitted statements regarding his marriage and wife's alleged abuse, but his testimony did not address his moral character. The petitioner also submitted letters from his daughter, son, his friend, [REDACTED]; evidence that he completed a ministerial course in 1996; that he provides financial support to his daughter; and that he completed a court-ordered residential treatment program for alcoholism on May 31, 2006.

The petitioner did not, however, submit evidence that he successfully completed probation and all other court orders for his 2006 DUI conviction. In addition, the evidence of the petitioner's ministerial work is over 12 years old and the brief letters from the petitioner's daughter, son and friend are insufficient to demonstrate that the petitioner has rehabilitated, given the length of his criminal record.

We acknowledge that the petitioner's convictions numbered 1 through 8 occurred between seven and 29 years before this petition was filed. Nonetheless, the petitioner's ninth conviction occurred after this petition was filed, which demonstrates a continuing lack of rehabilitation and good moral character. The December 2, 2003 and August 8, 2004 court orders in the petitioner's divorce case specifically reference the petitioner's alcoholism and condition the petitioner's visitation with his son on his participation in random alcohol testing and Alcoholics Anonymous. In addition, the petitioner's discharge summary from Life's Journey Center cites the petitioner as reporting his two DUI convictions and his "using and abusing cocaine and marijuana, however [he] maintains that alcohol is the drug of choice." Most importantly, the petitioner was convicted of his third DUI offense after this petition was filed and he has submitted no evidence that he successfully completed probation and fulfilled all other court orders in relation to his 2006 DUI conviction. Accordingly, the relevant evidence demonstrates that the petitioner is a habitual drunkard, barring a determination of his good moral character under section 101(f)(1) of the Act, 8 U.S.C. § 1101(f)(1).

Section 101(f) of the Act further prescribes, in pertinent part: "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." The regulation at 8 C.F.R. § 204.2(c)(1)(vii) also provides, 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 . . . although the acts do not require an automatic finding of lack of good moral character.

In this case, the present record shows that even if the petitioner had established that he was not convicted of crimes involving moral turpitude, he lacks good moral character given the length of his

criminal record, the fact that he admitted abusing alcohol and controlled substances, was convicted of a third DUI offense after this petition was filed and has not submitted evidence of recent rehabilitation. The petitioner has also failed to demonstrate that any of his convictions were related to his wife's battery or extreme cruelty or that his offenses were committed under other extenuating circumstances. Consequently, the petitioner has committed unlawful acts which adversely reflect upon his moral character.

IV. Conclusion

The petitioner was convicted of nine criminal offenses, the most recent of which occurred while this petition was pending. The petitioner failed to submit sufficient evidence of rehabilitation or that any of his convictions occurred under extenuating circumstances. The record shows that the petitioner is a habitual drunkard and that he has committed unlawful acts which adversely reflect upon his moral character. A finding of his good moral character is consequently barred under section 101(f) of the Act and pursuant to the regulation at 8 C.F.R. § 204.2(c)(1)(vii).

The petitioner has failed to demonstrate that he is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. He is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

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.