

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

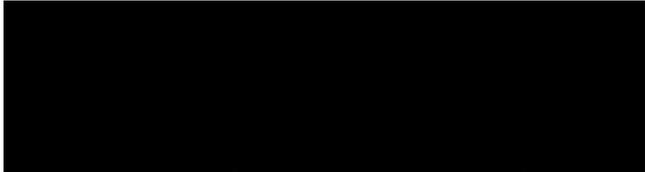
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090



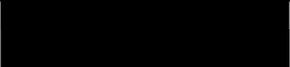
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Bg



FILE:



Office: VERMONT SERVICE CENTER

Date:

MAR 05 2009

EAC 05 117 52806

IN RE:



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.

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 service center director 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 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 on the basis of his determination that the petitioner had failed to establish: (1) that she shared a joint residence with her husband; and (2) that she entered into marriage with her husband in good faith.

The petitioner submitted a timely appeal on September 11, 2006.

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 explained further at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part, the following:

- (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.

* * *

- (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 filed under section 204(a)(1)(A)(iii) of the Act are explained further at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part, the following:

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.
- (ii) *Relationship.* A self-petition file by a spouse must be accompanied by evidence of . . . the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities. . . .

- (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.

* * *

- (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.

* * *

- (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 of proceeding establishes the following pertinent facts and procedural history. The petitioner is a citizen of Canada who entered the United States on or around May 10, 1984. The petitioner and S-P-¹ a citizen of the United States, had a daughter together on July 24, 1996. The

¹ Name withheld to protect individual's identity.

petitioner and S-P- were married on November 19, 1997 in Broward County, Florida. S-P- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on May 18, 2004. The petitioner filed Form I-485, Applicant to Register Permanent Residence or Adjust Status, on that same date.

The petitioner filed the instant Form I-360 on March 16, 2005. On June 29, 2005, the director issued a request for additional evidence, and requested additional evidence to establish whether the petitioner and S-P- were still married; whether she had ever been under immigration proceedings; whether she had shared a joint residence with S-P-; whether she had been subjected to battery and/or extreme cruelty by S-P-; whether she married S-P- in good faith; and why, if the couple had been separated since 1999 as claimed by the petitioner, he filed an I-130 petition on her behalf in 2004. The petitioner responded on August 30, 2005, and requested additional time in which to send a response. The petitioner submitted a second response on October 31, 2005, and again requested additional time in which to send a response. The director issued a second request for evidence on January 9, 2006, and requested the same evidence he requested in his first request. The petitioner responded on March 13, 2006, and submitted additional information. The director issued a notice of intent to deny (NOID) the petition on April 10, 2006, which notified the petitioner of deficiencies in the record and afforded her the opportunity to submit further evidence to establish that she had shared a joint residence with S-P-; that she had been subjected to battery and/or extreme cruelty by S-P-; and that she entered into marriage with S-P- in good faith. The petitioner responded on May 11, 2006, and submitted additional evidence. The petitioner submitted a second response to the director's NOID on May 15, 2006. After considering the evidence of record, the director denied the petition on August 10, 2006.

On appeal, the petitioner submits additional supporting documentation. Upon review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition.

Before examining the matters at issue on appeal, the AAO notes that the petitioner spends a great deal of time on appeal discussing the issue of battery and/or extreme cruelty. However, battery and/or extreme cruelty is not at issue on appeal; the director found that the petitioner had satisfied the relevant criteria required to establish battery and/or extreme cruelty. As noted previously, the director denied the petition on the basis of his determination that the petitioner had failed to establish: (1) that she shared a joint residence with her husband; and (2) that she entered into marriage with her husband in good faith. While the AAO acknowledges that the director did discuss the issue of battery and/or extreme cruelty in his May 10, 2006 denial, that discussion was within the context of discussing his April 10, 2006 NOID. Accordingly, the AAO will not discuss whether the petitioner was subjected to battery and/or extreme cruelty, as the director has already made the determination that she was in fact subjected to such treatment, and the AAO finds no reason to withdraw that finding.

Joint Residence

The first issue on appeal is whether the petitioner has established that she shared a joint residence with S-P-. On the Form I-360, the petitioner attested that she and S-P- shared a residence from November 1995 until December 1999. As noted previously, in his June 29, 2005 request for additional evidence, the director asked why, if the couple had stopped living together in 1999, S-P- filed a Form I-130 on

her behalf in 2004. In an undated letter received at the service center on May 15, 2006, the petitioner stated that the information on the Form I-360 was incorrect, and that she and S-P- never lived together, stating the following:

Although [S-P-] and I did have a 10-year relationship at that time, up and down, good and bad, we never resided together. It was certainly supposed to happen, but it did not.

On appeal, the petitioner requests that the statutory requirement of joint residence be “reconsidered in light of the fact that the abuse I endured was the direct cause of our non-traditional co-habitation. . . .” The petitioner states that not every relationship is traditional, particularly abusive ones; that S-P- has been a big part of her life over the past decade, both in and out of the house; that S-P- has had emotional control over her since she met him; that she feared sharing a joint residence with S-P-, due to his lack of a job and questionable fidelity, would destroy her and hurt the couple’s daughter; that she feared having S-P- in the home with no safe haven; that she was afraid to mingle their bills, as she would end up paying for all of them; and that, if they had two homes, she would not have to know what he was doing behind her back. The petitioner states that she “should not have to prove that our co-habitation was ‘normal’ or ‘traditional’ in order to qualify under the law,” and that she avoided a common residence with S-P- in order to protect herself from additional control, emotional pain, and possible bankruptcy.

The statute at section 204(a)(1)(A)(iii)(II)(dd) of the Act states, unequivocally, that in order to be granted immigrant classification under 204(a)(1)(A)(iii) of the Act as an alien battered or subjected to extreme cruelty by a United States citizen, the petitioner must establish that she shared a joint residence with S-P-. There are no exceptions to this requirement, and neither the statute nor the regulations afford the AAO the authority to provide discretionary relief from this requirement. As the petitioner acknowledges that she never shared a joint residence with S-P-, she has failed to establish eligibility under section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Good Faith Entry into Marriage

The director also found that the petitioner had failed to establish that she married S-P- in good faith. The AAO agrees. In his May 10, 2006 denial, the director stated that although the petitioner and S-P- were married on November 19, 1997, their daughter had been born sixteen months before the marriage ceremony. As their daughter was born before the marriage, and while the petitioner was still married to another man, the fact that the petitioner and S-P- have a child together is not necessarily evidence that the petitioner married S-P- in good faith. The director noted further that the petitioner had submitted no other evidence to demonstrate that she married S-P- in good faith, such as insurance policies in which she or S-P- is named as the beneficiary; bank statements, tax records, and other documents establishing that S-P- and the petitioner shared accounts and other similar responsibilities; evidence of the couple’s courtship, wedding ceremony, residences, or special events; evidence that the petitioner and S-P- jointly owned property; or affidavits from friends and family members who could provide specific information verifying the relationship between the petitioner and S-P-.

On appeal, the petitioner submits pictures and affidavits from friends and family stating that she married S-P- in good faith. However, the record contains very little detailed, probative information regarding the couple's early history together, including their courtship, their decision to marry, and their engagement, which would aid in establishing the petitioner's intentions upon entering into the marriage. Further, the fact that the couple never moved in together undermines any contention that the petitioner married S-P- in good faith. The evidence of record fails to demonstrate that the petitioner entered into marriage with S-P- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

The AAO agrees with the director's determination that the petitioner has failed to establish that she and S-P- shared a joint residence and that she entered into marriage with S-P- in good faith. Beyond the decision of the director, the AAO finds that the petition may not be approved for an additional reason: namely, that the petitioner has failed to establish that she is a person of good moral character.

Good Moral Character

The AAO finds that, beyond the decision of the director, the record also fails to establish that the petitioner is a person of good moral character. As noted previously, the regulation at 8 C.F.R. § 204.2(c)(1)(vii) states, in pertinent part, that "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, the following:

(f) For the purposes of this chapter--

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) . . . of section 1182(a)(2) of this title and subparagraph (C) thereof such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana). . . .

* * *

The fact that any person is not within any of the forgoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

The “classes of persons” referenced at section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3) are described at section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), in pertinent part, as follows:

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii),² any alien convicted of, or who admits to having committed, or who admits having committing acts which constitute the essential elements of—

* * *

(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. . . .

is inadmissible.

The record contains documentation from the Broward County, Florida Clerk’s Office establishing that the petitioner entered a plea of *nolo contendere* to two charges involving controlled substances on May 23, 1985: (1) possession of cocaine; and (2) delivery of cocaine.

Section 101(a)(48) of the Act, 8 U.S.C. § 1101(a)(48), defines “conviction” as follows:

² The exceptions referenced at section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), do not apply here.

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt. . . .

Pursuant to section 101(a)(48) of the Act, 8 U.S.C. § 1101(a)(48), the petitioner's plea of *nolo contendere* to the charges of cocaine possession and cocaine delivery constitute convictions of those two crimes for immigration purposes. Accordingly, for immigration purposes, the petitioner has been convicted of the crimes of cocaine possession and cocaine delivery.

A. The Statute Does Not Prescribe a Time Period During Which Good Moral Character Must be Shown

The statute does not state a time period during which the self-petitioner must demonstrate his or her good moral character. See Section 204(a)(1)(A)(iii)(II)(cc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(cc). The regulation at 8 C.F.R. § 204.2(c)(2)(v) states that primary evidence of a self-petitioner's good moral character includes local police clearances or state-issued criminal background checks from each place where the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Yet the regulation's designation of the three-year period preceding the filing of the petition does not limit the temporal scope of USCIS' 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). Here, the record contains evidence of the petitioner's 1985 convictions for cocaine possession and cocaine delivery, providing ample reason for USCIS to believe that the petitioner lacked good moral character beyond the three-year period preceding the filing of this petition.

B. The Petitioner was Convicted of Two Crimes in Violation of a Law or Regulation of a State Relating to a Controlled Substance

The record of proceeding is clear that the petitioner was convicted, for immigration purposes, of the crimes of cocaine possession and cocaine delivery. As was noted previously, the regulation at 8 C.F.R. § 204.2(c)(1)(vii) directs that 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. The petitioner's convictions for cocaine possession and cocaine delivery fall under section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3), as she falls into one of the "classes of persons" referenced at section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3), as described at section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). These convictions, therefore, preclude a finding of his good moral character pursuant to section 101(f)(3) of the Act.

Section 204(a)(1)(C) of the Act allows USCIS to find, as a matter of discretion, that a self-petitioner is a person of good moral character despite his or her violation of, or conspiracy or attempt to violate, any law or regulation of a State, the United States, or foreign country relating to a controlled substance if the crime is waivable for purposes of determining admissibility under section 212(a) of the Act and the crime was connected to the self-petitioner's having been battered or subjected to extreme cruelty. Neither of those options avail the petitioner any relief. First, there is no waiver available to persons convicted of violating, or attempting to violate, any law or regulation of a State, the United States, or foreign country relating to a controlled substance for purposes of determining admissibility under section 212(a) of the Act. Nor does any connection exist between the petitioner's 1984 convictions for cocaine possession and cocaine delivery and S-P-'s battery or extreme cruelty, as the petitioner's convictions occurred thirteen years before their 1997 marriage.

C. Statutory Bar, and Ultimate Finding with Regard to the Petitioner's Good Moral Character

As discussed previously, the record establishes that the petitioner was convicted of two crimes that fell under section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3), placing the petitioner into one of the "classes of persons" referenced at section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3), as described at section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), which prohibits a finding that the petitioner is a person of good moral character. Section 204(a)(1)(C) of the Act grants USCIS the discretion to find a petitioner to be a person of good moral character if: (1) the petitioner's conviction 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. There is, however, no waiver available for the petitioner's drug convictions. Further, the record does not establish that the petitioner's convictions were connected to S-P-'s battery or extreme cruelty. As the petitioner's convictions in took place thirteen years before her marriage, she has failed to establish a connection between those convictions and S-P-'s battery or extreme cruelty. Accordingly, section 204(a)(1)(C) of the Act is inapplicable to the petitioner's two known convictions for crimes involving controlled substances.

The record demonstrates that the petitioner was convicted of two crimes involving controlled substances: (1) possession of cocaine; and (2) delivery of cocaine. The present record thus fails to establish that the petitioner is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. For this additional reason, the petition may not be approved.

Conclusion

The AAO agrees with the director's determination that the petitioner has failed to establish that she and S-P- shared a joint residence and that she entered into marriage with S-P husband in good faith. The petitioner, therefore, is ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), and the petition must be denied. Beyond

the decision of the director, the AAO also finds that the petitioner has failed to establish that she is a person of good moral character.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”). *See also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.