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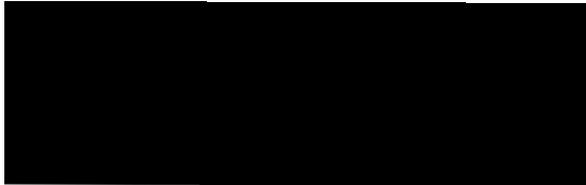
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090

U.S. Citizenship  
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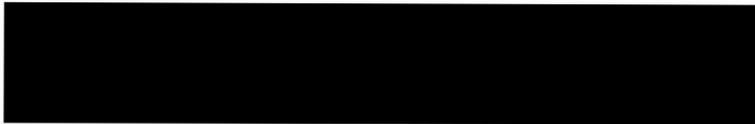
Office: VERMONT SERVICE CENTER

Date:

**MAY 11 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.

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 The decision of the director will be withdrawn and the petition will be remanded for further action.

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 because the petitioner failed to establish that he resided with his wife and was a person of good moral character.

On appeal, counsel submits a brief and additional evidence.

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 clause (ii) or (iii) of subparagraph (B), 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.

\* \* \*

(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. 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.

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 –

\* \* \*

(3) 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) [8 U.S.C. § 1182(a)(2)]

\* \* \*

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. . . .

As referenced in section 101(f)(3) of the Act, section 212(a)(2)(A) of the Act, includes, “any alien convicted of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . .”

The 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.

\* \* \*

(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.

*Pertinent Facts and Procedural History*

The petitioner entered the United States on October 19, 2003 as a nonimmigrant visitor (B-1) with authorization to remain until November 18, 2003. The petitioner married H-P-<sup>1</sup>, a U.S. citizen, in California on November 16, 2006. H-P- subsequently filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf, which she withdrew on May 11, 2007. On May 18, 2007, the National Benefits Center terminated action upon the Form I-130 and denied the petitioner's concurrently filed Form I-485, Application to Adjust Status.

The petitioner filed this Form I-360 on June 11, 2007. On June 22, 2007 and January 31, 2008, the director issued Requests for Evidence (RFE) of, *inter alia*, the petitioner's residence with his wife and his good moral character. The petitioner, through counsel, submitted additional evidence in response to the RFEs, which the director found insufficient to establish his eligibility. On July 24, 2008, the director denied the petition for failure to establish the requisite joint residence and good moral character. Counsel timely appealed.

The evidence submitted on appeal demonstrates that the petitioner resided with his wife, but the additional documents do not establish the petitioner's good moral character. Nonetheless, the petition will be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii)(2007) in effect at the time this petition was filed.

*Joint Residence*

On the Form I-360, the petitioner stated that he lived with his wife at a residence on [REDACTED] in Reseda, California from November 2006 to April 2007. The director determined that the petitioner had not resided with his wife because the record contained documents listing his address at three different locations during this time. The petitioner has overcome this ground for denial on appeal.

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<sup>1</sup> Name withheld to protect individual's identity.

On appeal, the petitioner explains that he lived with his wife in an apartment on [REDACTED] in Woodland Hills, California from November 2006 until April 2007, but they only had a six-month lease because they had planned on buying a house and they used his mother-in-law's address on Baird Avenue as their permanent mailing address. On appeal, the petitioner submits additional evidence of his residence with his wife including six cancelled checks for the monthly rent and electricity for their apartment from December 2006 to April 2007. The checks dated March 2, April 5 and 18, 2007, list the names of the petitioner and his wife, their [REDACTED] address and were drawn on their joint bank account. The petitioner also submits affidavits from his mother-in-law, the attorney who represented him in his domestic violence restraining order against his wife and a friend who all attest to the former couple's joint residence at the [REDACTED] apartment. The evidence submitted on appeal, combined with the relevant evidence submitted below<sup>2</sup>, demonstrates that the petitioner resided with his wife, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

#### *Good Moral Character*

The petitioner has not, however, overcome the second ground for denial and has failed to establish his good moral character on appeal. The petitioner submitted records which show that he was convicted of driving under the influence of alcohol (DUI) in violation of section 23152(a) of the California Vehicle Code, which states:

- (a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

Cal. Vehicle Code Ann. § 23152 (West 2007). California limits punishment for the first violation of this provision to imprisonment between 96 hours and six months and a fine between \$390 and \$1,000. Cal. Vehicle Code Ann. § 23536(a) (West 2007).

The petitioner was arrested on February 20, 2007. On April 27, 2007, the petitioner entered a plea of nolo contendere to, and was convicted of the DUI offense (Los Angeles County, Superior Court of California Case Number 7VY00830). The petitioner's February 28, 2008 California Department of Justice criminal record report shows that this DUI was his only conviction. The court sentenced the petitioner to 36 months of summary probation, 48 hours imprisonment, 20 days of community service in lieu of jail and ordered the petitioner to pay restitution and fines. On August 27, 2007, the court noted that the petitioner had paid restitution and completed community service. On March 25, 2008, the court noted that the petitioner had paid the remaining fines and had completed the DUI program. The last notation in the petitioner's court docket sheet is "probation in effect."

The statute under which the petitioner was convicted does not involve moral turpitude and the petitioner's offense does not fall within any of the enumerated provisions of section 101(f) of the Act.

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<sup>2</sup> The petitioner submitted his 2006 joint Internal Revenue Service (IRS) income tax transcript with his wife, copies of their joint bank account statements and joint cellular telephone bills.

However, section 101(f) of the Act states, 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) further prescribes that:

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.

The Ninth Circuit Court of Appeals, within whose jurisdiction this case arose, has held that when an alien’s conduct does not fall within any of the enumerated categories within section 101(f) of the Act, that conduct alone cannot support a finding that the alien lacks good moral character. *Torres-Guzman v. I.N.S.*, 804 F.2d 531, 534 (9<sup>th</sup> Cir. 1986). Rather, a determination of good moral character “requires the fact finder to weigh and balance the favorable and unfavorable facts or factors, reasonably bearing on character, that are presented in evidence.” *Id.* Relevant factors may include, but are not limited to, the alien’s family background, length of residence in the United States, employment history, financial status, criminal record (if any) and the alien’s rehabilitation and expression of remorse for his or her misconduct. *Id.* at 533; *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 367 (BIA 1991). The Board of Immigration Appeals has long held that “good moral character does not mean moral excellence and that it is not destroyed by ‘a single lapse.’” *Matter of Sanchez-Linn*, 20 I&N Dec. at 365 (quoting *Matter of B-*, 1 I&N Dec. 611 (BIA 1943)). However, “the greater the gravity of an individual’s past misconduct, the longer the period of intervening good conduct must be before an [alien] may be able to satisfactorily meet his burden of establishing that he is now a person of good moral character.” *Id.* at 365.

On appeal, counsel claims that because the petitioner was not convicted of a crime involving moral turpitude and “complied with all court requirements,” he has “clearly established that he is of good moral character.” Counsel is mistaken. Although the petitioner’s conduct does not fall within any of the enumerated bars to a finding of good moral character under section 101(f) of the Act, the record does not show that the petitioner complied with all court orders. On April 27, 2007, the court sentenced the petitioner to 36 months of probation, a term that will not expire until April 27, 2010. The petitioner submitted no evidence that his probation was terminated early. In addition, the petitioner did not pay the court-ordered restitution and fines or complete the court-ordered DUI program until after this petition was filed. Apart from his court records, the receipt for his fine payments and completion of the DUI program, the petitioner submitted no other evidence relevant to a determination of his moral character. Most importantly, the petitioner did not submit the requisite primary evidence of his own affidavit attesting to his good moral character pursuant to the regulation at 8 C.F.R. § 204.2(c)(2)(v). In his declaration submitted below, the petitioner did not address his moral character or acknowledge his conviction. In his affidavit submitted on appeal, the petitioner again fails to discuss his moral character or the circumstances surrounding his arrest and conviction.

In his favor, the petitioner has lived in the United States for over five years and paid federal income taxes for 2006. The petitioner stated that he was employed as a loan processor and submitted a

supporting statement from his coworker, [REDACTED]. However, [REDACTED] letter primarily discusses the abuse and the petitioner submitted no other evidence of his employment in the United States. The negative factors include the petitioner's criminal conviction, his failure to address his offense or express remorse for his crime, and the fact that he had not yet complied with all of the court's orders at the time this petition was filed. In addition, the record indicates that the petitioner remains on probation.

Although the petitioner faces no statutory bar to establishing his good moral character, a consideration of all the relevant evidence demonstrates that the negative factors outweigh the positive aspects of the petitioner's case. 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. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation in effect at the time this petition was filed, at 8 C.F.R. § 204.2(c)(3)(ii) (2007)<sup>3</sup>, required USCIS to provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision was made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of his case.

The burden of proof in visa petition proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

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<sup>3</sup> The regulation was amended to remove the specific requirement for a NOID on June 18, 2007. 72 Fed. Reg. 19100, 19107 (Apr. 17, 2007). The amended regulation applies to petitions filed on or after that date. *Id.* at 19104.