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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **JAN 24 2011**

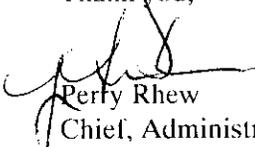
IN RE: Petitioner: [Redacted]

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:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The prior decision of the AAO will be withdrawn and the appeal will be sustained.

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. In its May 27, 2009 decision, the AAO dismissed the appeal because the record at that time showed that the petitioner was convicted of three crimes involving moral turpitude, only one which was connected to his wife's abuse, and the petitioner's criminal record of four convictions adversely reflected upon his moral character.

On motion, counsel submits evidence that his offenses under section 38.04(a) of the Texas Penal Code do not involve moral turpitude and that his conviction for displaying a false vehicle inspection certificate does not adversely reflect upon his moral character. The motion to reopen and reconsider will be granted because counsel submits both new evidence and caselaw indicating that the AAO's prior determination regarding section 38.04(a) of the Texas Penal Code was erroneous. *See* 8 C.F.R. § 103.5(a)(2) - (3) (requirements for motions to reopen and reconsider).

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 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.

As referenced in the regulation, section 101(f) of the Act, 8 U.S.C. § 1101(f), states, in pertinent part:

For the purposes of this Act – 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 . . . subparagraph[] (A) . . . of section 212(a)(2) [any alien convicted of a crime involving moral turpitude]

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 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.

Good Moral Character

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

1. On July 1, 2002, the petitioner was convicted of evading arrest in violation of section 38.04 of the Texas Penal Code:¹

- (a) A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him.
- (b) An offense under this section is a Class B misdemeanor

Tex. Penal Code Ann. § 38.04 (West 2002).

The petitioner was convicted of this Class B misdemeanor offense and sentenced to 15 days imprisonment in the county jail.

2. On June 23, 2003, the petitioner was convicted of evading detention in violation of the same section of the Texas Penal Code, which was also a Class B misdemeanor.² The petitioner was sentenced to two days imprisonment in the county jail and a \$250 fine.
3. On October 9, 2003, the petitioner was convicted of assault in violation of section 22.01 of the Texas Penal Code:³

- (a) A person commits an offense if the person:
 - (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
 - (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse;
 - (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
- (b) An offense under Subsection (a)(1) is a Class A misdemeanor . . .
- (c) An offense under Subsection (a)(2) or (3) is a Class C misdemeanor

Tex. Penal Code Ann. § 22.01 (West 2003)

¹ Harris County, Texas Criminal Court, Cause Number [REDACTED]

² Harris County, Texas Criminal Court, Cause Number [REDACTED]

³ Harris County, Texas Criminal Court, Cause Number [REDACTED]

The petitioner was convicted of a Class C misdemeanor and ordered to pay a \$500 fine.

4. On March 21, 2006, the petitioner was convicted of displaying a fictitious or counterfeit inspection certificate in violation of section 548.603 of the Texas Vehicle Code:⁴

A person commits an offense if the person:

...

(5) displays on a vehicle an inspection certificate that was obtained knowing that the vehicle does not meet all emissions inspection requirements for the vehicle.

Tex. Veh. Code Ann. § 548.603 (West 2006)

The petitioner was sentenced to 10 days imprisonment in the county jail.

Crimes Involving Moral Turpitude

In our prior decision, we determined that the petitioner lacked good moral character because he had been convicted of three crimes involving moral turpitude. 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). The Board of Immigration Appeals (BIA) has explained that moral turpitude “refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Matter of Franklin*, 20 I&N Dec 867,868 (BIA 1994), *aff’d*, 72 F.3d 571 (8th Cir. 1995). 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, the statute under which the conviction occurred controls. *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 would be 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 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.

In our prior decision, we determined that the petitioner’s convictions for evading arrest and detention under section 38.04(a) of the Texas Penal Code categorically involved moral turpitude and counsel had not presented any actual case in which the criminal statute was applied to conduct that did not involve moral turpitude. On motion, counsel submits a decision of the Texas Court of Appeals determining

⁴ Harris County, Texas Criminal Court, Cause Number [REDACTED]

that section 38.04 of the Texas Penal Code does not involve moral turpitude. *Dominguez v. Texas*, No. 07-02-0264-CR, 2003 WL 834778 (Tex. App. Mar. 4, 2003). Specifically, the Texas court explained:

Fleeing a police officer, though improper, does not necessarily involve moral depravity or dishonesty, as do crimes like theft, swindling, making a false report, or assault . . . (which crimes have been held as involving moral turpitude). . . . Nor do we view it as striking at the moral sentiment of the community. It is wrong, but it does not evince a morally bad person having a defective character. Thus, the crime is not one of moral turpitude.

Id. at *2.

The petitioner has met his burden of presenting an actual case in which it was held that section 38.04(a) of the Texas Penal Code applies to conduct that does not involve moral turpitude. Accordingly, the petitioner's convictions under that provision do not require an automatic finding that the petitioner lacks good moral character under section 101(f)(3) of the Act.

In our prior decision, we also determined that the petitioner was convicted of assault under a divisible statute and had not met his burden of demonstrating that he was convicted under a subsection that did not involve moral turpitude. Even if the petitioner's assault offense constituted a crime involving moral turpitude, however, based on the record as supplemented on motion, his crime would fall within the petty offense exception at section 212(a)(2)(A)(ii)(II) of the Act because the maximum term of imprisonment for a Class C misdemeanor in Texas does not exceed six months and the petitioner was not sentenced to any term of imprisonment for the offense. Tex. Penal Code Ann. §§ 12.23 (West 2003). In addition, the record shows that the petitioner's assault conviction was connected to his former wife's abuse and would not bar a finding of his good moral character pursuant to section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C).

Remaining Unlawful Acts do Not Adversely Reflect Upon the Petitioner's Moral Character

In our prior decision, we determined that the petitioner's remaining convictions, even if they did not fall within any of the enumerated provisions of section 101(f) of the Act, still evinced a lack of good moral character pursuant to the last sentence of section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii) (regarding "unlawful acts that adversely reflect upon [a petitioner's] moral character"). Our conclusion was based primarily on the fact that the petitioner had not acknowledged his two convictions for evading arrest and detention and the record contained no indication that those offenses were connected to the battery or extreme cruelty of the petitioner's wife. The petitioner had also not acknowledged his conviction for displaying a fictitious or counterfeit inspection certificate, which occurred in March 2006, while this petition was pending and over a year after the petitioner stated that he separated from his wife.

On motion, the petitioner submits an explanation of the circumstances surrounding his convictions for evading arrest and displaying a counterfeit inspection certificate. The petitioner credibly recounts that he was selling flowers on the street to make a living in 2002, but fled when he saw a police officer

approach because he did not have a vendor's license. The petitioner explains that he then obtained a vendor's license, but was again arrested in 2003 when he fled in fear of an officer that he had reason to believe would detain him regardless of the validity of his license. In 2006, the petitioner states that he bought a sticker for his car from a business that assured him it was valid and he did not realize it was falsified until he was arrested.

In support of his statements on motion, the petitioner submits copies of his vendor's license and valid vehicle inspection certificates. The petitioner also submitted letters from responsible persons who knowledgeably attested to his good moral character, including his pastor and the coordinator of a community center where he attended computer training courses. The record further contains copies of the petitioner's income tax returns and attendance at English as a Second Language classes.

On motion, the petitioner has established that none of his convictions pose a per se bar to a finding of his good moral character under section 101(f) of the Act. While we do not condone the petitioner's violations of Texas law, he has demonstrated by a preponderance of the evidence that his unlawful acts do not adversely reflect upon his moral character. The petitioner has demonstrated that he is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act, and has overcome the sole reason for denial of his petition. Consequently, the petitioner is eligible 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. The petitioner has met his burden. The prior decision of the AAO will be withdrawn, the appeal will be sustained and the petition will be approved.

ORDER: The May 27, 2009 decision of the Administrative Appeals Office is withdrawn. The appeal is sustained and the petition is approved.