

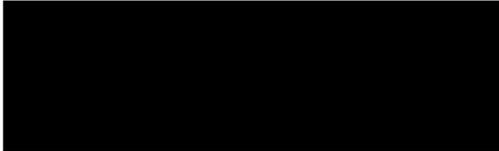
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

PUBLIC COPY



B9

FILE: [Redacted] Office: VERMONT SERVICE CENTER

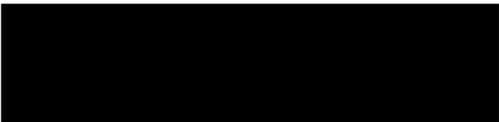
Date:

MAR 09 2011

IN RE: [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:



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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,
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 The director's decision will be withdrawn in part and affirmed in part. 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 on the basis of his determination that the petitioner had failed to establish that he is a person of good moral character because he was convicted of a crime involving moral turpitude and had shown no connection between his offense and his former wife's battery or extreme cruelty. On appeal, counsel submits a memorandum of law and additional evidence.

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).

An alien who has divorced a United States citizen may still self-petition under this provision of the Act if the alien demonstrates "a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse." Section 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) states, in pertinent part, the following:

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:

(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.

Section 101(f) of the Act, 8 U.S.C. § 1101(f), states, in pertinent part, that:

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 . . . subparagraphs (A) . . . of section 212(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. In the case of an alien who makes a false statement or claim of citizenship . . . , if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, [or] claim . . . that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

The evidentiary standard and 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:

(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.

Pertinent Facts and Procedural History

The petitioner, a citizen of Nigeria, married M-S-,¹ a citizen of the United States, on April 18, 2001. They divorced on January 7, 2009. On March 12, 2008, the petitioner was served with a Notice to Appear in Removal Proceedings.² The petitioner filed the instant Form I-360 on August 25, 2009. The director subsequently issued a request for additional evidence (RFE) and a notice of intent to deny (NOID) the petition, to which the petitioner, through counsel, filed timely responses. After considering the evidence of record, including the petitioner's responses to the RFE and NOID, the director denied the petition on March 25, 2010.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the director erroneously concluded that the petitioner was convicted of a crime involving moral turpitude. Nonetheless, the petitioner has failed to establish his good moral character for the reasons discussed below.

The Petitioner's Conviction

The record establishes that on July 27, 2007 the petitioner pled guilty to second degree assault in violation of section 3-203 of the criminal law of Maryland, an offense punishable by imprisonment up to 10 years and a fine up to \$2,500 or both. Md. Code Ann., Crim. Law (West 2007). The petitioner's offense was disposed under the Maryland Probation Before Judgment (PBJ) program. The criminal court sentenced the petitioner to one year of probation and ordered him to pay court costs, complete a batterer's program and have no contact with the victim, his former wife.

In his initial statement on the Form I-290B, Notice of Appeal, counsel claimed that the disposition of the petitioner's offense as PBJ did not result in a conviction. Counsel is mistaken. Although successful completion of probation under the PBJ program will clear the offender's record under Maryland law, the offense remains a conviction under the immigration law. Section 101(a)(48)(A) of the Act defines the term "conviction" to include programs where "adjudication of guilt has been

¹ Name withheld to protect individual's identity.

² The petitioner remains in removal proceedings before the Baltimore Immigration Court and his next hearing is scheduled for March 16, 2011.

withheld” and “the alien has entered a plea of guilty” and “the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.” Under Maryland Criminal Law, PBJ occurs when the defendant pleads guilty or nolo contendere, or the court finds the defendant to be guilty; and the court places the defendant on probation while staying the entry of judgment. Md. Code Ann., Crim. Proc. § 6-220 (West 2007). Accordingly, the petitioner’s PBJ constituted a conviction for immigration purposes as it included both a guilty plea and a restraint on his liberty.

The Petitioner’s Crime Did Not Involve Moral Turpitude

The director determined, without analysis, that the petitioner’s conviction for second degree assault was a crime involving moral turpitude. The director was mistaken. The term “crime involving moral turpitude” is not defined in the Act or in the regulations, but has been part of the immigration laws of the United States 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 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). The BIA has further held that “[t]he test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind. An evil or malicious intent is said to be the essence of moral turpitude.” *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980) (internal citations omitted). 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. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)(citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)); *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *Matter of Silva-Trevino*, 24 I&N Dec. at 696. In evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability” that the statute would be applied to conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). If so, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” *Id.* at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry by reviewing the record of conviction to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

In this case, the petitioner was convicted of second-degree assault in violation of section 3-203 of

the Maryland Criminal Law.³ Assault is defined in Maryland as “the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings.” Md. Code. Crim. Law § 3-201(b) (West 2007). The Maryland Supreme Court has determined that “assault” means “(1) a consummated battery or the combination of a consummated battery and its antecedent assault, (2) an attempted battery, and (3) a placing of a victim in reasonable apprehension of an imminent battery.” *Cruz v. Maryland*, 963 A.2d 1184, 1188 n.3 (Md. 2009) (citing *Lamb v. State*, 613 A.2d 402, 404 (Md. 1992)). The Maryland Supreme Court has further determined that “battery” consists of “the unlawful application of force to the person of another,” which may be the result of an “intentional or reckless act” by the defendant. *Id.*

On its face, section 3-203 of the Maryland Criminal Law is a simple assault statute. While simple assault or battery is generally not deemed to involve moral turpitude for immigration purposes, this general rule does not apply where an assault or battery necessarily involves some aggravating dimension that significantly increases the culpability of the offense, such as the infliction of serious injury or the perpetrator's use of a deadly weapon. *See Matter of Sanudo*, 23 I&N Dec. 968, 970-71 (BIA 2006); *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). Accordingly, we must apply the modified categorical approach or look for evidence outside the record of conviction pursuant to *Matter of Silva-Trevino* to determine whether the respondent's conviction involved serious bodily injury, use of a weapon or some other aggravating factor that would denote moral turpitude. *Matter of Guevara Alfaro*, 25 I&N Dec 417, 421-22 (BIA 2011).

The transcript of the petitioner's plea hearing indicates that his offense arose during an altercation with his former wife during which he threw a container of bathroom cleanser that hit her back, leaving a small red mark. The record indicates that the petitioner's offense involved no weapon, only recklessness, and did not cause serious bodily injury or contain any other aggravating factor. Accordingly, the petitioner's crime did not involve moral turpitude and section 101(f)(3) of the Act does not prohibit a finding of the petitioner's good moral character. The portion of the director's decision to the contrary is hereby withdrawn.

The Petitioner Lacks Good Moral Character for Other Reasons

Although the petitioner does not fall within any of the classes of persons specifically delineated at section 101(f) of the Act, he has not demonstrated his good moral character because he has

³ Assault in the second degree.

(a) Prohibited.- A person may not commit an assault.

(b) Penalty . . . [A] person who violates subsection (a) of this section is guilty of the misdemeanor of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$2,500 or both.

committed unlawful acts which reflect adversely upon his moral character, his behavior falls below the standards of the average citizen and he failed to submit primary evidence of his good moral character.

Although the incident resulting in the petitioner's conviction was not a crime involving moral turpitude, his behavior still adversely reflects upon his character as he acted recklessly resulting in injury to his former wife. The record also contains evidence that the petitioner falsely claimed to be a U.S. citizen when applying for mortgage loans on two separate occasions.⁴ The record contains no evidence that the petitioner falls within the exception of the last paragraph of section 101(f) of the Act, which allows a finding of good moral character despite a false claim to citizenship. Falling outside of that exception does not automatically mandate a finding that the petitioner lacks good moral character. *Matter of Guadarrama*, 24 I&N Dec. 625 (BIA 2008). However, the relevant evidence in this case shows that the petitioner's false claims of U.S. citizenship in 2006 were followed by his assault conviction in 2007 and in 2009, the petitioner was ordered to refrain from harassing and threatening his former wife in their final divorce decree. This sequence of events indicates ongoing behavior below the standards of the average citizen in the community.

In addition, the petitioner submitted no statement regarding his moral character and he does not discuss the incident which led to his assault conviction. As primary evidence of a self-petitioner's good moral character is the self-petitioner's affidavit, the petitioner has failed to meet this threshold evidentiary requirement prescribed by the regulation at 8 C.F.R. § 204.2(c)(2)(v).

On appeal, counsel claims the petitioner merits a favorable exercise of discretion because his conviction was connected to his former wife's abuse and he "is involved in the community and has substantial financial assets." However, the transcript of the petitioner's plea indicates that the incident leading to his conviction was mutually combative. The record also lacks any evidence regarding the petitioner's involvement in his community. While the record indicates that the petitioner and his former wife jointly owned a bank account and a house, there is no evidence that the petitioner has acquired "substantial financial assets," or that such assets contributed to his good moral character. The record thus does not support counsel's claims and the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, the record contains recommendation letters from three individuals who praise the petitioner's character, but they do so in general terms and two of the individuals do not state the basis of their acquaintance with the petitioner or otherwise demonstrate that they are "responsible persons who can knowledgeably attest to the self-petitioner's good moral character." See 8 C.F.R.

⁴ The record contains evidence that the petitioner made false claims to United States citizenship on January 26, 2006 when applying for a mortgage loan to purchase a property located at [REDACTED] in [REDACTED], Maryland and on September 30, 2006 when applying for a mortgage to purchase a property located at [REDACTED].

§ 204.2(c)(2)(v) (providing for the consideration of other credible evidence of good moral character such as affidavits that meet this standard).

Conclusion

The record shows that the petitioner has committed unlawful acts which adversely reflect upon his moral character and that his behavior was below the standards of the average citizen in the community. The petitioner failed to submit primary evidence of his good moral character, as prescribed by the regulation at 8 C.F.R. § 204.2(c)(1)(vii) and did not demonstrate that he merited a favorable exercise of discretion. Consequently, the petitioner has not established that he is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Accordingly, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act, and this petition must remain denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.