

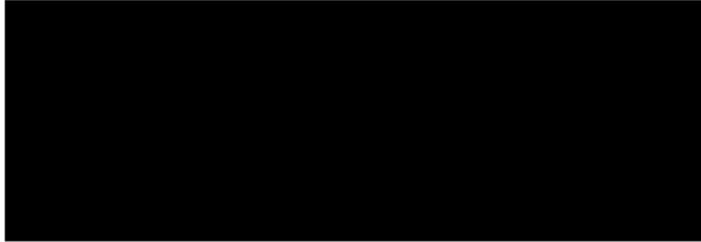
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



B9

DATE: **AUG 28 2012** Office: VERMONT SERVICE CENTER

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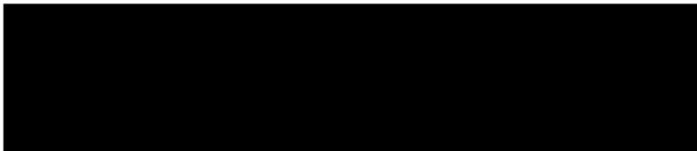


IN RE: Self-Petitioner:



PETITION: Petition for Immigrant Abused Child Pursuant to Section 204(a)(1)(B)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630 or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Vermont Service Center director (“the 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)(B)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(iii), as an alien child battered or subjected to extreme cruelty by a parent who is a United States lawful permanent resident.

The director denied the petition for failure to show that she resided with her lawful permanent resident father and that she is a person of good moral character. On appeal, counsel submits a brief and additional evidence.

#### *Relevant Law and Regulations*

Section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1), defines a child as, in pertinent part, “an unmarried person under 21 years of age.” Regarding children born out of wedlock, section 101(b)(1) of the Act further provides:

(C) a child legitimated under the law of the child’s residence or domicile, or under the law of father’s residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation . . . .

Section 204(a)(1)(B)(iii) of the Act provides:

An alien who is the child of an alien lawfully admitted for permanent residence, or who was the child of a lawful permanent resident who within the past 2 years lost lawful permanent resident status due to an incident of domestic violence, and who is a person of good moral character, who is eligible for classification as under section 203(a)(2)(A), and who resides, or has resided in the past, with the alien’s permanent resident alien parent may file a petition with the [Secretary of Homeland Security] under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the [Secretary] that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien’s permanent resident parent.

Section 204(a)(1)(D)(v) of the Act provides a late-filing waiver for individuals meeting the following requirements:

For purposes of this paragraph, an individual who is not less than 21 years of age, who qualified to file a petition under subparagraph (A)(iv) or (B)(iii) as of the day before the date on which the individual attained 21 years of age, and who did not file such a petition before such day, shall be treated as having filed a petition under such subparagraph as of such day if a petition is filed for the status described in such subparagraph before the individual attains

25 years of age and the individual shows that the abuse was at least one central reason for the filing delay. . . .

The eligibility requirements are explained further at 8 C.F.R. § 204.2(e)(1), which states, in pertinent part, the following:

(v) *Residence.* A self-petition will not be approved if the self-petitioner is not residing in the United States when the self-petition is filed. 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 United States 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.

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) and (B) of section 212(a)(2) . . . .

\* \* \*

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)) . . . .

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, 8 U.S.C. § 1182(a)(2)(A), 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." Additionally, as referenced in section 101(f)(3) of the Act, section 212(a)(2)(B) of the Act includes,

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were five years or more is inadmissible.

As referenced in section 101(f)(8) of the Act, section 101(a)(43) states, in pertinent part, that the term "aggravated felony" is defined as:

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least one year. . . .

Section 204(a)(1)(C) of the Act further provides:

Notwithstanding section 101(f), an act or conviction that is waivable with respect to the petitioner for purposes of a determination of the petitioner's admissibility under section 212(a) or deportability under section 237(a) shall not bar the [Secretary of Homeland Security] from finding the petitioner to be of good moral character under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) if the [Secretary of Homeland Security] finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty.

The evidentiary standard and guidelines for a self-petition filed under section 204(a)(1)(B)(iii) of the Act are explained further at 8 C.F.R. § 204.2(e)(2), which states, in pertinent part, the following:

(iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together in the United States. One or more documents may also be submitted showing that the self-petitioner is residing in the United States when the self-petition is filed. Employment records, school records, hospital or medical records, 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.

Section 204(a)(1)(J) of the Act 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 regulation at 8 C.F.R. § 204.2(e)(2)(i) further states:

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.

#### *Pertinent Facts and Procedural History*

The petitioner is a citizen of Mexico who was born out of wedlock in Baja California on March 8, 1986. The petitioner entered the United States without inspection in August of 1988 when she was almost two years old. The petitioner's parents were married on November 16, 1994 in California when she was eight years old. According to California's laws pertaining to legitimation, the petitioner is considered a child legitimated by the subsequent marriage of her parents because her father is listed on her birth certificate.<sup>1</sup>

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<sup>1</sup> Cal. Fam. Code § 7611(c)(1) (West 2012).

The petitioner's father, M-A-<sup>2</sup>, is a lawful permanent resident of the U.S. The petitioner filed the instant Form I-360 on March 8, 2011 when she was 25 years old. The director subsequently issued a Request for Evidence (RFE) of the petitioner's good moral character. The petitioner, through counsel, timely responded with additional evidence which the director found insufficient to establish the petitioner's eligibility and the petition was denied. Counsel timely appealed.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record fails to demonstrate the petitioner's eligibility for the following reasons.

### *Residence*

The record demonstrates that the petitioner resided with her abusive father, M-A-. In the denial of the self-petition, the director determined that the petitioner failed to show that she resided with M-A- but did not state a basis for this determination. The relative evidence in the record contains: affidavits from the petitioner, her mother, and her brother; the petitioner's unofficial school transcript; and a redacted police report that states M-A- resided with and physically assaulted his wife and daughter. Upon appeal, counsel submits an un-redacted copy of the police report which shows that the petitioner shared the same address as her father. Counsel also submits an affidavit from the petitioner's mother, Ana Isabel Aguilera attesting that she lived with her ex-husband and the petitioner from 1988 until 2005. The petitioner has submitted sufficient documentation below and on appeal to establish that she resided with M-A-. Accordingly, the record establishes by a preponderance of the evidence that the petitioner resided with her abusive father, as required by section 204(a)(1)(B)(iii) of the Act. The director's contrary determination is hereby withdrawn.

### *Good Moral Character*

The director correctly determined that the petitioner lacked good moral character due to her two criminal convictions. On appeal, counsel asserts that the petitioner's convictions were connected to the abuse by her father. The record shows that the petitioner was convicted of two crimes involving moral turpitude, which the petitioner has not shown to be connected to any qualifying abuse and which bar a finding of her good moral character pursuant to section 101(f) of the Act.

The record documents the petitioner's criminal convictions as follows:

1) On December 6, 2004, the petitioner was convicted of second degree robbery in violation of section 212.5(c) of the California Penal Code<sup>3</sup> (CPC):

All kinds of robbery other than those listed in subdivisions (a) and (b) are of the second degree.<sup>4</sup>

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<sup>2</sup> Name withheld to protect the individual's identity.

<sup>3</sup> Superior Court of California, Santa Clara County, Case number [REDACTED]

Cal. Penal Code Ann. § 212.5(c) (West 2012).

2) On December 6, 2004, the petitioner was convicted of assault with a deadly weapon or force likely to produce great bodily harm in violation of section 245(a)(1) of the CPC:

Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

Cal. Penal Code Ann. § 245(a)(1) (West 2012).

The petitioner was sentenced to a total of seven years in prison and ordered to pay restitution to the victim. The record does not indicate whether or not the petitioner successfully completed her jail sentence and paid the court-ordered fines.

Both of these convictions bar the petitioner from showing good moral character because she was confined as a result of a conviction for an aggregate period of more than one hundred and eighty days as per section 101(f)(7) of the Act. Additionally, the petitioner's convictions for crimes involving moral turpitude further bar a finding of her good moral character. *See Mendoza v. Holder*, 623 F.3d 1299, 1303 (9<sup>th</sup> Cir. 2010) (robbery constitutes a crime involving moral turpitude); *Uppal v. Holder*, 605 F.3d 712, 717 (9<sup>th</sup> Cir. 2010) (assault with "some aggravating dimension" such as assault with a deadly weapon constitutes a crime involving moral turpitude). The petitioner's assault with a deadly weapon conviction is also a crime of violence aggravated felony as per section 101(a)(43)(F) of the Act. *See Ortiz-Magana v. Mukasey*, 542 F.3d 653, 653 (9<sup>th</sup> Cir. 2008) (assault with a deadly weapon under CPC § 245(a)(1) is a crime of violence aggravated felony). On appeal, counsel concedes that the petitioner was convicted of two crimes involving moral turpitude.

Counsel claims that the petitioner's offense was connected to her father's abuse and that she merits a favorable exercise of discretion finding her to have good moral character despite her convictions pursuant to section 204(a)(1)(C) of the Act. The record does not support counsel's claim. A self-petitioner may, according to section 204(a)(1)(C) of the Act, be found to have good moral character despite an act or conviction that would otherwise bar such a finding under section 101(f) of the Act if: 1) the alien's act or conviction is waivable for the purposes of determining admissibility or deportability under section 212(a) or section 237(a) of the Act; and 2) U.S. Citizenship and Immigration Services (USCIS) determines that the act or conviction was connected to the alien's

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<sup>4</sup> CPC § 212.5(a) pertains to robberies committed against operators and/or passengers of transportation vehicles such as buses, taxicabs, cable cars, etc. CPC § 212.5(b) pertains robberies of any person while using an automated teller machine, immediately after the person has used the machine, or when the person is in the vicinity of the automated teller machine. These acts are classified as robberies of the first degree.

having been battered or subjected to extreme cruelty. Although inadmissibility due to a conviction for a crime involving moral turpitude is waivable for self-petitioners under section 212(h)(1)(C) of the Act, the petitioner has not demonstrated a connection between her conviction and her father's battery or extreme cruelty. In her February 19, 2011 personal statement, the petitioner stated that all she had known her entire life was violence by her father. She stated that she was beaten, kicked, and insulted by him and witnessed this same treatment of her mother. The petitioner explained that as a result, "Violence seemed like an acceptable outlet for me" and that this "attitude" that she learned from her "violent home life" got her into trouble. The petitioner does not state that her father instigated her robbery and assault with a deadly weapon or was otherwise involved in her commission of those crimes.

In addition, regardless of whether the petitioner's offense was also a crime involving moral turpitude and was connected to her father's abuse, she has not shown that her conviction for an aggravated felony is waivable. Section 237(a)(2)(A)(vi) of the Act, 8 U.S.C. § 1127(a)(2)(A)(vi), only provides a deportability waiver for aliens convicted of an aggravated felony who have been granted a full and unconditional pardon by the President of the United States or by a State Governor. USCIS does not have the authority to grant such a pardon and the record does not indicate that the petitioner has received such a pardon. Consequently, the "waiver authorized" by section 237(a)(2)(A)(vi) of the Act is not "waivable with respect to the petitioner" in this case under section 204(a)(1)(C) of the Act. The present record thus fails to establish the petitioner's good moral character, as required by section 204(a)(1)(B)(iii) of the Act.

#### *Filing Delay*

Beyond the director's decision, the petitioner failed to timely file the Form I-360.<sup>5</sup> Section 204(a)(1)(D)(v) of the Act states that an individual who "qualified to file a petition under subparagraph (A)(iv) or (B)(iii) as of the day before the date on which the individual attained 21 years of age," shall be treated as having done so if the individual files before attaining 25 years of age and can show that the abuse was "at least one central reason for the filing delay." The petitioner filed the Form I-360 on March 8, 2011, the day of her 25<sup>th</sup> birthday and therefore is ineligible for the late-filing waiver at section 204(a)(1)(D)(v) of the Act. She consequently is ineligible for immigrant classification as the abused child of a U.S. lawful permanent resident under section 204(a)(1)(B)(iii) of the Act for this additional reason.

#### *Conclusion*

The petitioner was convicted of two crimes for which she was sentenced to seven years of imprisonment and which preclude a finding of her good moral character under subsections 101(f)(3), (7) and (8) of the Act. The petitioner's two offenses also show a lack of good moral character under the final paragraph of section 101(f) of the Act and 8 C.F.R. § 204.2(c)(1)(vii). The

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<sup>5</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

petitioner has not established any connection between her criminal convictions and her father's battery or extreme cruelty meriting a favorable exercise of discretion finding her to have good moral character despite her criminal record under section 204(a)(1)(C) of the Act. Further, the petitioner's assault with a deadly weapon is an aggravated felony and not waivable for purposes of establishing good moral character. Consequently, the petitioner has not established that she is a person of good moral character, as required by section 204(a)(1)(B)(iii) of the Act.

Beyond the director's decision, the petitioner has also failed to establish that she is eligible for the late-filing waiver at section 204(a)(1)(D)(v) of the Act as she did not file the Form I-360 prior to her 25<sup>th</sup> birthday.

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; *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). Here, that burden has not been met. Accordingly, the appeal will be dismissed and the petition will remain denied.

**ORDER:** The appeal is dismissed.