

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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Date: DEC 18 2012

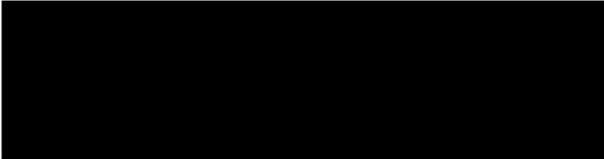
Office: VERMONT SERVICE CENTER

FILE: 

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)

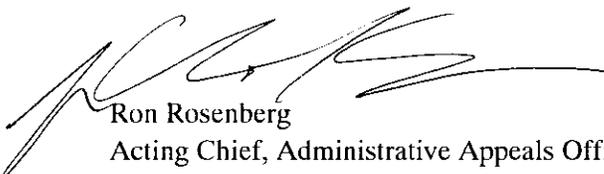
ON BEHALF OF PETITIONER:



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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Vermont Service Center director denied the immigrant petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks immigrant classification pursuant to 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 her U.S. citizen spouse.

The director denied the petition for failure to establish that the petitioner has a qualifying relationship as the spouse of a U.S. citizen and is eligible for immigrant classification based upon that relationship.

On appeal, counsel submits a brief and additional evidence.

Relevant Law and Regulations

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 further 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:

(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 . . . subparagraph[] (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...

As referenced in section 101(f)(3) of the Act, section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) 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 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.

(ii) *Relationship.* A self-petition filed by a spouse must be accompanied by evidence of citizenship of the United States citizen It must also be accompanied by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages

* * *

(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 Mexico, entered into a common law marriage with J-M-¹ a citizen of the United States, on March 5, 2006 in Austin, Texas upon her eighteenth birthday. They divorced on April 19, 2012, after the petitioner filed the instant Form I-360 on November 4, 2010. The director subsequently issued a request for additional evidence (RFE) of, *inter alia*, the petitioner's marriage to J-M-. The petitioner, through counsel, submitted additional evidence which the director found insufficient to establish the petitioner's eligibility. The director denied the petition and counsel timely appealed.

The AAO reviews these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Counsel's claims and the evidence submitted on appeal have overcome the director's grounds for denial and the appeal will be sustained for the following reasons.

Qualifying Relationship

The regulation at 8 C.F.R. § 204.2(c)(2)(ii) provides that evidence for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act requires that the petitioner submit evidence of the marital relationship, including proof of the termination of all prior marriages, and evidence of the citizenship of the U.S. citizen spouse.

The petitioner initially did not submit evidence to fulfill this requirement. In response to the RFE, the petitioner resubmitted a personal statement, a birth certificate for J-M- showing that he was born in Childress County, Texas, and a copy of the Texas Family Code section 2.401, "Proof of Informal Marriage" detailing the requisites to establish a common law marriage. The petitioner also submitted a letter from J-M-'s grandmother with whom they lived and a letter from [REDACTED] referencing J-M- as the petitioner's spouse.

¹ Name withheld to protect the individual's identity.

In denying the petition, the director found that the submitted evidence did not demonstrate that the petitioner and J-M- were married because they did not meet the three prong test for a common law marriage as prescribed by the Texas Family Code. The director concluded that the record did not contain satisfactory evidence to demonstrate that the petitioner had a qualifying relationship with a U.S. citizen and was eligible for immediate relative classification based on that relationship under section 201(b)(2)(A)(i) of the Act.

On appeal, counsel submits a final decree of divorce by the district court in Travis County, Texas showing that the petitioner and J-M- were divorced on April 19, 2012. She asserts that the Supreme Court of Texas has clearly held that a valid marriage is a prerequisite to divorce and therefore the petitioner has established that she was married in common law to J-M-.

Under the law in Texas, an “informal marriage,” also known as a common law marriage, is formed when a man and a woman mutually agree to be married, live in the state of Texas as a married couple, and represent to others that they are married. *See* TEX. FAM CODE ANN. § 2.401 (West 2012); *see also Matter of C*, 1 I.&N. Dec. 301, 302 (BIA 1942); *Matter of Garcia*, 16 I.&N. Dec. 623 (BIA 1978). In order to obtain a divorce, the Supreme Court of Texas has held that:

A valid marriage is a prerequisite to a support order in action for divorce. The existence of the marriage must be admitted or shown before such a decree or order properly can be made. Where marriage is denied... the marriage must be at least tentatively established.

See Ex parte Threet, 333 S.W.2d 361, 364 (Tex. Mar 23, 1960).

The Texas Supreme Court has further held that once established, a common law marriage may only be terminated by death or a court decree. *See Estate of Claveria v. Claveria*, 615 S.W.2d 164, 167 (Tex. Feb 11, 1981). The divorce decree submitted on appeal shows that the marriage between the petitioner and J-M- was dissolved on the ground of cruelty and therefore the state of Texas recognized the petitioner’s informal marriage with J-M-. The preponderance of the evidence submitted below and on appeal demonstrates that the petitioner and J-M- were married. Accordingly, the petitioner has established that she had a qualifying relationship as the spouse of a U.S. citizen and was eligible for immediate relative classification based upon that relationship, as required by subsections 204(a)(1)(A)(iii)(II)(aa),(cc) of the Act.

Good Moral Character

The director further noted in his decision that the petitioner’s record appears to contain a crime involving moral turpitude and therefore the petitioner failed to establish that she is a person of good moral character. The director did not cite a basis for this determination.

A crime involving moral turpitude must involve both reprehensible conduct and some degree of intent or knowledge of wrong-doing, be it specific intent, deliberateness, willfulness or recklessness. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n.1, 706 n.5 (A.G. 2008). The record shows that on May 25, 2010, the petitioner pled guilty to a Class A misdemeanor charge of

criminal mischief under section 28.03(a) of the Texas Statutes and received a sentence of 50 days confinement. Section 28.03(a) of the Texas Statutes states:

- (a) A person commits an offense if, without the effective consent of the owner:
 - (1) he intentionally or knowingly damages or destroys the tangible property of the owner;
 - (2) he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person; or
 - (3) he intentionally or knowingly makes markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner.

See TEX. PENAL CODE ANN. § 28.03 (West 2010).

The Board of Immigration Appeals (BIA) has found criminal mischief not to be a crime involving moral turpitude when evil intent is not an element of the crime. See *In Re B-*, 2 I. & N. Dec. 867, 869 (BIA 1947) (the conviction for malicious mischief did not require base or depraved conduct nor did the records allege such conduct). Because the Texas statute does not require malicious intent, the petitioner's conviction for criminal mischief is not a crime involving moral turpitude. Even if criminal mischief under Texas law involved moral turpitude, it would not bar a finding of the petitioner's good moral character because her conviction would fall within the petty offense exception at section 212(a)(2)(A)(ii)(II) of the Act. The maximum sentence of imprisonment for a Class A misdemeanor is one year. See TEX. PENAL CODE ANN. § 12.21 (West 2010). The petitioner was only sentenced to 50 days of imprisonment.

Primary evidence of a self-petitioner's good moral character is his or her affidavit supported by local police clearances or state criminal background checks for every residence over six months during the three years preceding the filing of the petition. 8 C.F.R. § 204.2(c)(2)(v). On appeal, the petitioner submits a personal declaration and current police clearances showing that she has not had any further arrests since 2010. In her declaration, the petitioner credibly explains the circumstances surrounding her 2010 arrest and subsequent conviction. She describes how after her former husband committed theft, he approached her in violation of her protective order against him, was arrested for that violation and ultimately convicted of theft. The record supports the petitioner's account of these events and shows that her conviction was related to her former husband's abuse. The petitioner expresses remorse for her poor decisions and also submits letters from her sister and three friends attesting to her good moral character. The preponderance of the evidence demonstrates that the petitioner is a person of good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Conclusion

On appeal, the petitioner has overcome the director's grounds for denial and she is consequently eligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

In these proceedings, the petitioner bears the burden of proof to establish her eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has now been met. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained.