

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: **OCT 22 2012**

Office: VERMONT SERVICE CENTER

File: 

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:

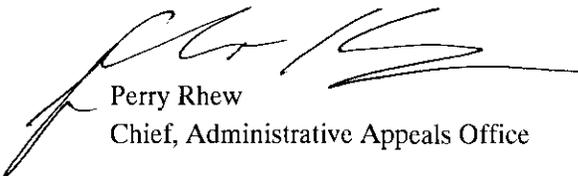


INSTRUCTIONS:

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 Director, Vermont Service Center, (“the director”) denied the immigrant visa petition and affirmed his decision upon granting the petitioner’s motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 his U.S. citizen spouse.

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 multiple crimes involving moral turpitude. The director further found that the record does not demonstrate that extenuating circumstances caused the petitioner to commit these crimes. On appeal, counsel submits a brief 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:

(vi) *Battery or extreme cruelty.* For the purpose of this chapter, the phrase “was battered by or was the subject of extreme cruelty” includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including

rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner’s marriage to the abuser.

(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...

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:

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.

* * *

(iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

(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 India, married S-A,¹ a citizen of the United States, on February 3, 2001. They divorced on January 27, 2010. The petitioner filed the instant Form I-360 on August 9, 2010. The director subsequently issued a request for additional evidence (RFE) of, *inter alia*, the petitioner's good moral character. The petitioner, through counsel, submitted a letter explaining that he was scheduled for fingerprints with the New Jersey State Police on July 18, 2011. The petitioner failed to submit the requested police record and the director denied the petition on September 6, 2011. The

¹ Name withheld to protect the individual's identity.

petitioner timely filed a motion to reopen and reconsider the director's decision with a brief and additional evidence.² After considering the evidence of record, the director affirmed his previous decision denying the petition on February 9, 2012. The petitioner timely appealed.

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. However, the petitioner failed to establish his good moral character for other reasons and the appeal will be dismissed as discussed below.

Good Moral Character

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

- 1) On August 4, 2005, the petitioner was arrested and charged with sexual assault in the second degree in violation of section 2C:14-2c(4) and endanger welfare of children in the third degree in violation of section 2C:24-4 of the New Jersey Code of Criminal Justice. The petitioner requested and was admitted into New Jersey's Pre-Trial Intervention (PTI) Program for a term of 36 months. The petitioner successfully completed the program and the charges were dismissed on July 29, 2010.
- 2) On September 16, 2009, the petitioner was arrested and charged with sexual assault in the second degree in violation of section 2C:14-2c(4) and endanger welfare of children in the second degree in violation of section 2C:24-4 of the New Jersey Code of Criminal Justice. The petitioner pled not guilty to these charges. In a negotiated plea agreement between the prosecutor and the petitioner, the original charges were dismissed and the petitioner pled guilty to the lesser charge of harassment in violation of section 2C:33-4b of the New Jersey Code of Criminal Justice. On September 9, 2010, the court ordered the petitioner to have no contact with the victim and sentenced him to one year of probation conditioned on his completion of a psychological evaluation, a "TASC Evaluation" and compliance with all recommendations therefrom, random drug testing and his obtainment of employment.

As referenced in section 101(f)(3) of the Act regarding those who may not be found to have good moral character, section 212(a)(2)(A) of the Act states, in pertinent part:

(i) In General

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

² The petitioner was ordered removed by the Newark Immigration Court on October 19, 2011 and the Board of Immigration Appeals dismissed his appeal on September 11, 2012.

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if –

.....
(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The director correctly concluded that second degree sexual assault under the 2005 New Jersey statute is a crime involving moral turpitude (CIMT). Crimes involving moral turpitude “require conduct that is ‘inherently base, vile or depraved’.” *Jean-Louis v. Atty. Gen.*, 582 F.3d 462, 465 (3d Cir. 2009) (quoting *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004) (internal citations omitted). In determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, within whose jurisdiction this case arose, makes a categorical inquiry, which consists of looking “to the elements of the statutory state offense . . . reading the applicable statute to ascertain the least culpable conduct necessary to sustain conviction under the statute” and then “measur[ing] that conduct for depravity.” *Id.* at 465-66. Where a statute of conviction contains disjunctive elements, some of which involve moral turpitude and others which do not, the Third Circuit applies a modified categorical approach and examines the record of conviction to determine the specific subsection under which the defendant was convicted. *Id.* at 466.

At the time of the petitioner’s arrest in 2005, New Jersey Statutes Annotated (NJSA) § 2C:14-2c(4) provided: “An actor is guilty of sexual assault if he commits an act of sexual penetration with another person...[and the] victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.”³ This law defines a crime of statutory rape with no *mens rea* regarding the perpetrator’s knowledge of the victim’s age. However, the Third Circuit Court of Appeals has held that moral turpitude inheres in strict liability sex offenses that require purposeful conduct “because of the community consensus that such offenses, which are enacted for the protection of the child, are inherently antisocial and depraved.” *Mehboob v. Atty. Gen.*, 549 F.3d 272, 277 (3d Cir. 2008). The New Jersey statute in this case requires the purposeful commission of an act of sexual penetration with the victim. Accordingly, second degree sexual assault under NJSA § 2C:14-2c(4) (2005) is a crime involving moral turpitude.

The director incorrectly concluded that the New Jersey child endangerment statute constituted a CIMT as per *Hernandez-Perez v. Holder* 569 F.3d 345 (8th Circ. 2009). In *Hernandez-Perez v. Holder*, the court held that a conviction under the Illinois child endangerment statute was a CIMT because of the requirement that the convicted person act in “conscious disregard of a substantial risk

³ N.J. Stat. Ann. 2c:14-2c(4) (West 2005).

to a child.” See *Hernandez-Perez v. Holder* 569 F.3d at 348 n. 8 (8th Cir. 2009). The New Jersey statute in this case is divisible and only one portion of the statute has a *mens rea* similar to the Illinois statute examined in *Hernandez-Perez*. At the time of the petitioner’s arrest, the New Jersey law provided:

Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child, or who causes the child harm that would make the child an abused or neglected child as defined in R.S.9:6-1, R.S.9:6-3 and P.L.1974, c. 119, s.1 (C.9:6-8.21) is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this subsection to a child under the age of 16 is guilty of a crime of the third degree.

N.J. Stat. Ann. § 2C:24-4(a) (West 2005).

The statute is divisible because the first clause entails the morally turpitudinous conduct of engaging in sexual conduct impairing or debauching the morals of a child, but the second clause prohibits causing harm to a child making the child abused or neglected, conduct which may or may not involve moral turpitude. The record in this case does not specify under which part of the statute the petitioner was charged and to determine whether or not the petitioner’s alleged offense constituted a CIMT, we would have to apply the modified categorical approach as outlined in *Jean-Louis v. Atty. Gen.*, which would require further inquiry into the record of the conviction. No such inquiry is possible in this case because the petitioner was not convicted of this offense, contrary to the director’s determination.

The petitioner’s 2005 arrest did not result in convictions for second degree sexual assault and endangering the welfare of children in the third degree because the charges were dismissed upon the petitioner’s completion of New Jersey’s PTI Program. Consequently, the director erroneously determined that the petitioner’s 2005 dispositions resulted in convictions automatically barring a finding of his good moral character.

A conviction for immigration purposes is defined at section 101(a)(48)(A) of the Act:

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The petitioner’s 2005 charges of second degree sexual assault and third degree endanger welfare of children were dismissed on July 29, 2010 upon his successful completion of New Jersey’s PTI Program. The disposition of the petitioner’s offenses in 2005 under New Jersey’s PTI Program did

not result in a conviction because the petitioner did not enter a plea of guilty nor did he admit sufficient facts to warrant a finding of guilt. Under New Jersey Rules of Court Governing Criminal Practice, participation in the PTI program does not require an informal admission or entry of a plea of guilt.⁴ Instead, the New Jersey Court Rules specify that certain conditions be met for admittance to and successful completion of the program.⁵ Accordingly, the petitioner's PTI disposition is not a conviction under section 101(a)(48)(A) of the Act. Nor does the petitioner's PTI disposition pose a per se bar to a finding of his good moral character under sections 101(f)(3) and 212(a)(2)(A)(i)(I) of the Act because he never admitted committing, or committing acts which constitute the essential elements of, second degree sexual assault and third degree endanger the welfare of children under the NJSA.

Although not part of the director's analysis, the petitioner was also arrested in 2009 on similar charges. He originally pled not guilty and under a plea agreement, pled guilty to harassment under NJSA § 2C:33-4b. The statute states in relevant part that a person "commits a petty disorderly persons offense, if, with purpose to harass another, he...[s]ubjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so...".⁶ Counsel incorrectly asserts that harassment under NJSA § 2C:33-4b is not a CIMT because New Jersey does not classify harassment as a crime, but as a disorderly persons offense. Regardless of the state classification of an offense, it may still be considered a CIMT for immigration purposes if the petitioner was convicted of the offense, admitted committing the offense or admitted committing acts which constitute the essential elements of the offense. Section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i). Nonetheless, the petitioner's harassment offense falls within the petty offense exception from classification as a CIMT at section 212(a)(2)(A)(ii)(II) of the Act because the maximum term of imprisonment for a petty disorderly persons offense is six months⁷ and the petitioner was not sentenced to any term of imprisonment.

Although the petitioner has not been convicted of a CIMT, he has failed to establish that he is a person of good moral character for other reasons. The regulation at 8 C.F.R. § 204.2(c)(2)(v) prescribes that "[p]rimary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit." The petitioner submitted two affidavits below but did not explain the circumstances surrounding his arrests. In his first affidavit, the petitioner did not attest to his good moral character nor did he address either of his arrests or his conviction. In his second affidavit, he stated only that his former wife and step-daughter made a police complaint against him with false allegations. He did not provide further probative details regarding his arrests nor did he assert his good moral character. Instead, the petitioner submitted six letters from: his [REDACTED], his [REDACTED] and his [REDACTED] and [REDACTED]. The letter from [REDACTED] stated that the petitioner is "religious, good, and [a] man of high moral and character values." The letter from the petitioner's daughter described him as honorable. The letters from [REDACTED] and [REDACTED] all briefly describe the petitioner as a good person. None of

⁴ N.J. R. Ct. Crim. R. 3:28, Guideline 4 (West 2012); see also *Pinho v. Gonzalez*, 432 F.3d 193, 195 n. 1 (3rd Cir. 2005) (discussing New Jersey's Pretrial Intervention Program).

⁵ *Id.* at Guidelines 2-8.

⁶ N.J. Stat. Ann. § 2C:33-4b (West 2012).

⁷ N.J. Stat. Ann. § 2C:1-4 (West 2010).

the support letters indicate, however, that any of the individuals are aware of the petitioner's criminal history and can knowledgeably attest to his good moral character.

In addition, although the petitioner's criminal record does not invoke an enumerated bar to a finding of his good moral character at section 101(f) of the Act, his record still indicates that he lacks good moral character for other reasons under the last paragraph of section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii). The petitioner's charges in 2005 were not dismissed until July 29, 2010, just 11 days before this petition was filed. Subsequently, the petitioner was convicted of harassment on September 9, 2010, after this petition was filed. Although the period of his probation has now passed, the petitioner submitted no evidence on appeal that he successfully completed probation and complied with the other court-ordered conditions of his sentence. The petitioner also submitted no evidence that his harassment conviction occurred under extenuating circumstances. Consequently, the record indicates that the petitioner committed an unlawful act which adversely reflects upon his moral character.

The petitioner failed to submit the primary evidence of his good moral character required by the regulation at 8 C.F.R. § 204.2(c)(2)(v) and his criminal record adversely reflects upon his moral character pursuant to the regulation at 8 C.F.R. § 204.2(c)(1)(vii). The petitioner has thus failed to demonstrate his good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Battery or Extreme Cruelty

Beyond the decision of the director, the record fails to demonstrate that the petitioner was battered or subjected to extreme cruelty by his former wife.⁸ The relative evidence in the record contains: the petitioner's affidavits, medical records, and police reports. In his first affidavit, the petitioner stated that "on or about 2003" he began to experience problems in the marriage with S-A-. He stated that she engaged in verbal and psychological harassment against him which resulted in his mental distress. He stated that she always demanded money from him, had affairs, and threatened to have him deported. In his second affidavit submitted in response to the RFE, the petitioner stated that S-A- used him for money and prevented him from visiting his mother in India. He stated that she "never took care of her household" and "needed money for her costly lifestyle such as smoking two packs per day." He briefly stated that S-A- and her daughter made a police complaint against him that was false but does not give additional probative details or explanations of how this was part of the abuse. The criminal records he submitted only cite the original charge and the charge he pled guilty to in accordance with a plea agreement. The petitioner further stated that he suffered from a massive heart attack that he blamed on the stress caused by the claimed abuse. However, nothing in the medical records suggests a link between his heart condition and any domestic violence. Instead, the records note that the petitioner smokes tobacco and has a family history of heart disease. The petitioner did not submit additional evidence linking his medical problems with the claimed abuse.

⁸ 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).

When viewed in the aggregate, the relevant evidence submitted fails to demonstrate that the petitioner's former wife subjected him to battery or extreme cruelty during their marriage. The petitioner's statements contain much of the same information and because infidelity alone does not constitute extreme cruelty, his assertions do not provide sufficient, probative details of the claimed abuse. The remaining, relevant evidence in the record is insufficient to establish that S-A- battered the petitioner or that her behavior constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi). Accordingly, the petitioner has not established that S-A- subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Qualifying Relationship and Corresponding Eligibility for Immediate Relative Classification

As the petitioner has failed to establish the requisite battery or extreme cruelty, he has also failed to demonstrate any connection between his divorce and such battery or extreme cruelty. Consequently, beyond the director's decision, the petitioner has not demonstrated that he had a qualifying relationship with a U.S. citizen and was eligible for immediate relative classification based on such a relationship, as required by subsections 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc) and (cc) of the Act.

Conclusion

In these proceedings, the petitioner bears the burden of proof to establish his 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 (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.