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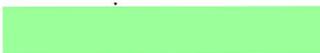
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

Date: **NOV 18 2013**

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)

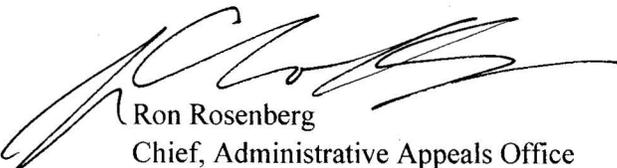
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, (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 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 for failure to establish the petitioner's good moral character. On appeal, counsel submits a brief and an updated statement from the petitioner.

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).

In regards to determining a petitioner's good moral character, section 101(f) of the Act, 8 U.S.C. 1101(f), states in pertinent parts:

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 1182(a)(2) [of this Act] . . . ;

...

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. . . .

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 further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

(vii) *Good moral character.* A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A 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.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

(i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

* * *

(v) *Good moral character.* Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. 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 is a citizen of Australia who entered the United States on May 18, 2003 as a P1 nonimmigrant visitor and thereafter remained in the United States beyond the period of authorized stay. The petitioner married his third wife, E-K-¹ a U.S. citizen, on March 22, 2008 in Nevada.

On November 2, 2011, the petitioner was placed in removal proceedings. He subsequently filed the instant Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, on March 28, 2012. The director subsequently issued two Requests for Evidence (RFEs) and a Notice of Intent to Deny (NOID) the petition, requesting evidence of the petitioner's good moral character, among other things. The petitioner timely responded to the RFEs and the NOID. After considering the evidence of record, the director denied the petition on March 25, 2013. The petitioner filed a timely appeal. Thereafter, the petitioner departed the United States on September 14, 2012 under an order of voluntary departure under safeguards issued by the immigration court on August 16, 2012.

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, including the evidence submitted on appeal, fails to establish the petitioner's eligibility. On appeal, the petitioner has failed to overcome the director's ground for denial and the appeal will be dismissed for the following reasons.

The Petitioner's Criminal History

The petitioner was convicted of Assault-Family Violence, a misdemeanor offense, under the Texas Penal Code (Tex. Penal Code)² on December 1, 2004, following a plea of *nolo contendere*. The criminal court deferred judgment and ordered twelve months of probation. The victim of the assault was the petitioner's second wife, T-K-³

On October 28, 2011, the petitioner was arrested for Criminal Threats with Intent to Terrorize in violation of Tex. Penal Code § 422 involving threats against his current U.S. citizen spouse, E-K-. The petitioner was then released into the custody of U.S. Immigration and Customs Enforcement (ICE) on November 2, 2011 where he remained until his departure from the United States in September 2012. A letter from the San Diego County District Attorney's Office, dated November 29, 2011, indicates that criminal charges were not being filed, but could be filed at a later date.

Counsel does not contest the petitioner's Assault-Family Violence conviction, and correctly notes that the petitioner does not fall within one of the enumerated provisions of section 101(f) of the Act barring a finding of good moral character as a result of this conviction.⁴

¹ Name withheld to protect individual's identity.

² The record of conviction does not cite the relevant statutory provisions but the offense of Assault-Family Violence falls within section 22.01(1) (assault) of the Tex. Penal Code and section 71.004(1) (family violence) of the Texas Family Code (Tex. Fam. Code Ann.) (West 2004).

³ Name withheld to protect individual's identity.

⁴ As a misdemeanor offense, the maximum penalty possible under the Texas Penal Code for the petitioner's conviction for Assault-Family Violence does not exceed one year, and the petitioner was

The Petitioner Lacks Good Moral Character

Even if the petitioner's unlawful acts do not fall within an enumerated provision of section 101(f) of the Act, he has still failed to demonstrate his good moral character on appeal. Section 101(f) of the Act states, in pertinent part, that "[t]he 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 regulation at 8 C.F.R. § 204.2(c)(1)(vii) further prescribes that, "[a] self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she . . . committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character."

The Ninth Circuit Court of Appeals (Ninth Circuit), within whose jurisdiction this case falls, has held that an isolated incident of poor conduct by an alien, that does not fall within any of the enumerated categories within section 101(f) of the Act, cannot by itself support a finding that the alien lacks good moral character. *Torres-Guzman v. I.N.S.*, 804 F.2d 531, 534 (9th Cir. 1986). Rather, a determination of good moral character "requires the fact finder to weigh and balance the favorable and unfavorable facts or factors, reasonably bearing on character, that are presented in evidence." *Torres-Guzman*, 804 F.2d at 534. Relevant factors may include, but are not limited to, the alien's family background, length of residence in the United States, employment history, financial status, criminal record (if any) and the alien's rehabilitation and expression of remorse for his or her misconduct. *See id.* at 533; *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 367 (BIA 1991). The Board of Immigration Appeals (BIA) has long held that "good moral character does not mean moral excellence and that it is not destroyed by 'a single lapse.'" *Matter of Sanchez-Linn*, 20 I&N Dec. at 365 (quoting *Matter of B-*, 1 I&N Dec. 611 (BIA 1943)). However, "the greater the gravity of an individual's past misconduct, the longer the period of intervening good conduct must be before an [alien] may be able to satisfactorily meet his burden of establishing that he is now a person of good moral character." *Matter of Sanchez-Linn*, 20 I&N Dec. at 365.

On appeal, counsel claims that all the favorable factors in the record and the petitioner's reasonable explanation for his 2004 conviction establish the petitioner's good moral character.

As indicated, the petitioner has a 2004 conviction for Assault-Family Violence in Texas against his second wife, T-K-, who he divorced on January 5, 2007. The conviction record, titled "Order Granting Deferred Misdemeanor Probation," shows that the petitioner pled *nolo contendere* to the charge, "as alleged in the information." The criminal information in the record asserts that the petitioner "intentionally or knowingly or recklessly cause[d] bodily injury to [T-K-], a member of the defendant's family, by striking [T-K-] and/or pulling [T-K-] out of a vehicle and/or dragging [T-K-] across pavement and/or kicking [T-K-] in the stomach and/or slamming [T-K-]'s head into the

not sentenced to a term in excess of six months. Thus, even if the conviction constituted a crime involving moral turpitude, it would still fall within the petty offense exception to such classification pursuant to section 212(a)(2)(A)(ii)(II) of the Act and is not within any of the automatic bars to a finding of the petitioner's good moral character under section 101(f)(3) of the Act.

console of a pickup truck.” The police reports in the record further indicate that the petitioner’s ex-wife asserted that the petitioner slammed her head against the passenger side car console, dragged her out of a car in an isolated area, repeatedly hit and kicked her on the ground where she had fallen, and forced her back in the car. The petitioner’s ex-wife reported that she escaped later by running out of the car to seek assistance from the driver of another car who then called the police. The police records also show that photographs of bruises on the petitioner’s ex-wife face, knees, arms and legs were taken and that she was taken to the hospital.

On appeal, the petitioner categorically maintains that the assertions made by his ex-wife are untrue, and that in fact, it was his ex-wife who abused him during this altercation and fabricated the facts that led to his conviction. However, the petitioner’s plea of *nolo contendere* to the charges that he committed these violent acts against his spouse, his acceptance of one year of probation as an added restraint on his liberty, and his failure to file criminal charges against his ex-spouse, all contradict his assertion. The petitioner maintains that he was innocent of the charges and would never have agreed to take a plea had his lawyer at the time advised him of the immigration consequences. However, he offers no explanation for the injuries and bruises that the police officer on the scene observed on T-K’s face, knees, arms and legs, even though the petitioner claims he never physically assaulted his ex-wife during this incident. The petitioner, in his May 19, 2013 statement, asserts that it was T-K who clawed him, punched him in the face, and began to draw blood while he was driving. He asserts that he acted only in self-defense and did nothing to seriously harm his ex-wife. The petitioner contends that, at one point, he slammed the brakes to avoid losing control when T-K started attacking him again while he was driving, causing T-K, who was not wearing a seat belt, to fly into the dashboard. As indicated, the petitioner’s account of this incident does not explain the various bruises witnessed on his ex-wife’s face and body. Further, the police report does not show that similar injuries were observed on the petitioner’s face and body, despite his assertion that his ex-wife repeatedly attacked him physically and drew blood.

On appeal, counsel contends that it is improper to consider the allegations in the 2004 criminal information and police report in determining the petitioner’s good moral character, because the conviction record does not disclose the facts to which the petitioner ultimately pled *nolo contendere*. For instance, counsel notes the disjunctive language of the facts alleged in the charging document, which would allow for a conviction whether the petitioner committed the offense “intentionally or knowingly or recklessly” and based on just one of the specified criminal acts alleged or any combination of them. Thus, counsel contends that the petitioner could have been convicted of the offense even if he pled to only recklessly pulling his ex-wife out of the vehicle.

Counsel correctly notes that in the Ninth Circuit, the police report and the criminal information (without a corresponding signed plea agreement) are not part of the conviction record, and cannot be used for the purpose of establishing removability under section 237 of the Act. *See S-Yong v. Holder*, 600 F.3d 1028, 1035 (9th Cir. 2010). However, in the context of a discretionary determination for relief from removal, all *relevant* evidence of the applicant’s moral character may be considered. *See, e.g., Torres-Guzman*, 804 F.2d at 533-34 (evidence regarding aspects of the individual’s life, such as school, lack of criminal history, employment, family background, and financial status, are always relevant in determining good moral character). More importantly, in these proceedings, United States Citizenship and Immigration Services (USCIS) must consider any

credible evidence relevant to the petition. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); 8 C.F.R. § 204.2(c)(2)(i). Moreover, the petitioner bears the burden of proof in these proceedings to demonstrate his good moral character. Sections 204(a)(1)(A)(iii)(I) and (II)(bb), 291 of the Act, 8 U.S.C. §§ 1154(a)(1)(A)(iii)(I) and (II)(bb), 1361. Given that the conviction record states that he pled *nolo contendere* to the charge of Assault-Family Violence, as alleged on the information, he has failed to meet his burden to show that he pled guilty to facts other than those charged on the information. Moreover, as discussed, the petitioner failed to reconcile his claim of innocence in the 2004 incident with the reporting police officer's observations of the physical injuries to T-K- following the altercation, and the corresponding lack of similar observations regarding any physical injuries to the petitioner to support the petitioner's claim that he was the one who was physically attacked.

In addition, the petitioner was again arrested in October 2011 for threatening his current spouse, E-K-. A police incident report, dated October 24, 2011, indicates that following the petitioner's threats to kill E-K- and his erratic behavior over a period of a few days, E-K- left the couple's residence and went into hiding with their infant child. The petitioner's wife then reported the matter to police and sought a protective order at the advice of her attorney. During the interview, she stated that the petitioner had extensive firearms, quasi-military and mercenary training, including training conducted by a former Navy Seal, and that he had had recently designed and built a military rifle. Another report, dated October 28, 2011, indicates that the petitioner's wife claimed that the petitioner had been physically abusive towards her on several occasions during the course of their relationship, where he had punched her in her face, attempted to smother her, choked her, and threatened to kill her. She alleged that the petitioner possessed a firearm that he had pointed at her on one occasion, and expressed fear for her and her child's physical safety due to the petitioner's training and connections.

The petitioner maintains that his wife is the one who emotionally and physically abused him in their relationship and that he did not have a choice but to accede to her unreasonable demands, including demands for money, because she threatened him with deportation. The October 28, 2011 arrest report shows, however, that during the police interview, the petitioner admitted there were violent confrontations between himself and his wife where he had choked her or tried to hold her, but maintained this was in self-defense or to calm his wife down. The petitioner also stated that he had trained with Navy Seals and had extensive combat training. He admitted that, although he did not have any guns registered in his name, he had borrowed a rifle to take care of coyotes on the property and at one point had ammunition needed for a Navy Seal course at his home. A police interview with the couple's nanny indicated that she had seen the rifle and that it had been in the petitioner's possession for approximately eight months.

The police reports show that the petitioner initially filed a missing persons report after his wife and child left, but later also attempted to file battery charges against his wife. The petitioner claims that he did not initially attempt to press charges because he was afraid of his wife's threats to use his prior conviction and immigration status against him. Yet, the police report notes that the petitioner sent a text message to his wife days after her disappearance in October 2011, saying "where are you" and "you have 30 min." The petitioner has also maintained that his wife was financially dependent on him and that she emotionally abused and manipulated him to force him to provide for her

financially at the level she wished to be maintained. However, he does not explain why his wife would then file false charges leading to his arrest and testify before the immigration court for his continued detention, thus preventing him from providing for her financially as she wished.

Counsel for the petitioner asserts that as the 2011 arrest did not lead to a conviction, it should not be considered at all. However, the police report for this arrest is relevant evidence in a discretionary determination of the petitioner's character. As noted, USCIS is mandated to consider all credible relevant evidence. Section 204(a)(1)(J) of the Act; 8 C.F.R. § 204.2(c)(2)(i). Under the Act, the determination of what evidence is credible and the weight to be given that evidence "shall be within the sole discretion of [USCIS.]" Section 204(a)(1)(J) of the Act. While one incident of poor conduct may not necessarily be enough to show that an individual lacks good moral character, a history of misconduct may. The police reports here include statements made by the petitioner, his wife, and other individuals that are relevant here, and show that the petitioner, who is over six feet tall and over 200 pounds, has admitted to more than one violent encounter where he claims that, in self-defense, he choked and/or smothered his wife, who is approximately five feet three inches tall and 130 pounds. Thus, these reports provide credible evidence that the petitioner's 2004 conviction was not an isolated incident.

The petitioner has also submitted nine written references in support of his good moral character, two of which are unsigned. The authors of the letters assert that the petitioner is a person of good character, but several of them appear to know the petitioner primarily on a professional basis and offer no insight into the petitioner's personal relationship with his spouse or ex-spouse. Two of the reference letters allege that the petitioner's spouse is a person of bad character and each recite separate incidents where the petitioner's wife made derogatory comments evidencing this poor character. However, none of the references address whether the authors had any knowledge of the petitioner's prior criminal conviction or history of any abuse or violence, or lack thereof, by the petitioner.

The petitioner also submitted three reports, prepared in December 2011, by an investigative company hired on behalf of the petitioner in preparation for the petitioner's removal proceedings and applications for relief from removal before the immigration court. The first two reports summarize interviews with eighteen subjects, nearly all of whom reported their belief that the petitioner was a good and a gentle person as far as they know. The subjects also make varying allegations of the petitioner's wife's bad character, ranging from her poor business reputation and unethical business practices to her manipulation of, and threats against, the petitioner. None of the subjects reference any knowledge they may have regarding the petitioner's previous domestic violence conviction. The last report summarizes interviews with four individuals who made statements against the character of the petitioner's ex-wife, T-K-, but none of them appear to be aware of the petitioner's conviction for domestic violence against T-K- or the underlying circumstances.

The investigative reports can be given little weight. For the most part, the subjects of these interviews overwhelmingly offer more adverse character references against the petitioner's ex-wife and his wife, rather than affirmative evidence of the petitioner's good character. The record shows that the reports were originally submitted in support of the petitioner's applications to the immigration court for bond during custody determination proceedings and for relief from removal,

prior to the filing of the instant petition. The reports contain no interviews with individuals who were impartial and had direct knowledge into the petitioner's relationship with his wives, such as the employees at the petitioner's home who are referenced in the 2011 police reports.

De novo review of all the relevant evidence fails to establish the petitioner's good moral character. The positive factors include the fact that prior to his incarceration, the petitioner paid child support for his older child. In addition, the petitioner has been gainfully employed in the United States, and has paid federal income taxes for the years 2008 and 2009. The negative factors include the petitioner's criminal conviction, his failure to accept responsibility for his crime or show rehabilitation. Relevant credible evidence in the record shows that the petitioner's unlawful acts against his former spouse were not an isolated occurrence. The petitioner was arrested in 2011 for threatening his wife and he admitted to police that he had previously used physical violence against his wife. Although the petitioner's 2004 offense did not result in an automatic bar to a finding of his good moral character under section 101(f) of the Act, he was still convicted on that occasion of unlawful acts that adversely reflect upon his moral character and fall below the standards of the average citizen in the community. The petitioner has failed to establish extenuating circumstances to account for his conviction and other unlawful actions. Consequently, the petitioner lacks good moral character pursuant to section 101(f) of the Act and 8 C.F.R. § 204.2(c)(1)(vii), and as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Conclusion

On appeal, the petitioner has failed to demonstrate his good moral character. He is consequently ineligible 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 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, 375 (AAO 2010); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.