

(b)(6)



U.S. Citizenship
and Immigration
Services

Date: AUG 26 2014

Office: VERMONT SERVICE CENTER

File: [REDACTED]

IN RE:

Petitioner: [REDACTED]

PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

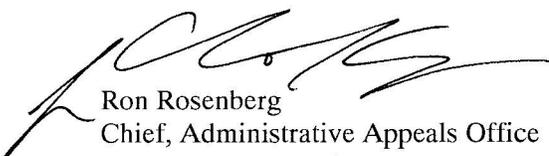
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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.

Thank you,


Ron Rosenberg
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 sustained.

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 was a person of good moral character.

Relevant Law and Regulations

Section 204(a)(1)(A)(iii)(I) of the Act provides, in pertinent part, 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, 8 U.S.C. § 1154(a)(1)(J) 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 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:

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 –

...

(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

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. . . . 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 Mexico who entered the United States as a visitor on a border crossing card on October 15, 1998. The petitioner married a U.S. citizen, on November 28, 2007 in Colorado. Throughout the marriage, the petitioner's husband repeatedly battered her and subjected her to extreme cruelty by threatening her with death, deportation and taking their toddler son away from her. The petitioner's husband was convicted of three criminal offenses arising from his

domestic violence against the petitioner: felony menacing with a weapon, harassment through striking or shoving and was eventually sentenced to imprisonment for assault.

After their separation, the petitioner became involved with another man who also turned violent. Following an incident of domestic violence, the petitioner was arrested and charged with three offenses, two of which were dismissed. On [REDACTED] 2011, the petitioner was convicted of attempt to commit criminal mischief, a misdemeanor offense in violation of section 18-4-501 of the Colorado Revised Statute. The judge sentenced the petitioner to six months of jail, with six months of credit for the time she had spent in civil detention pending resolution of her immigration related removal proceedings. The petitioner filed this Form I-360 on August 7, 2012. The director subsequently issued a Notice of Intent to Deny (NOID) the petition because she determined the petitioner's conviction barred a finding of her good moral character. The director found the petitioner's response to the NOID insufficient to establish her good moral character and denied the petition.

On appeal, counsel submits a brief and additional evidence. *De novo* review of the record, as supplemented on appeal, demonstrates the petitioner's eligibility.¹ The appeal will be sustained for the following reasons.

Analysis

Section 101(f)(7) of the Act bars a finding of an alien's good moral character if the alien was confined to a penal institution for an aggregate period of 180 days or more resulting from a conviction. In this case, the director determined that the petitioner was imprisoned for six months for her conviction and concluded that section 101(f)(7) prohibited the petitioner from demonstrating good moral character. On appeal, counsel asserts that section 101(f)(7) of the Act is inapplicable because the petitioner was not confined in a penal institution, but was held in the custody of United States Immigration and Customs Enforcement (ICE) within the Department of Homeland Security (DHS) at a civil detention facility pending resolution of her removal proceedings. The record supports counsel's claims.

The plain language of section 101(f)(7) of the Act requires confinement to a "penal institution," such as a jail, prison or other criminal correction facility. The word "penal" connotes penalty or punishment, especially for a crime. Black's Law Dictionary 1246 (9th ed. 2009). Detention of aliens by DHS occurs at facilities which hold individuals for civil immigration purposes, not criminal correction. *See Matter of Valdez*, 21 I&N Dec. 703, 712 (BIA 1997) ("The civil immigration detention of criminal aliens is not intended to 'punish' any past criminal conduct."). Accordingly, the petitioner's detention in the custody of ICE pending resolution of her immigration proceedings is not equivalent to confinement to a penal institution under section 101(f)(7) of the Act.

¹ *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (the AAO engages in *de novo* review of the record on appeal).

In addition, section 101(f)(7) of the Act requires that the confinement occur “as a result of conviction.” The Ninth Circuit Court of Appeals, within whose jurisdiction this case arose, has noted that pretrial detention falls outside the scope of section 101(f)(7) of the Act. *See Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 886 (9th Cir. 2005) (“The requirement that the confinement be as a result of a conviction precludes counting any time a person may have spent in pretrial detention.”).

In this case, the petitioner was arrested on January 6, 2011 and confined at a county jail until the judge ordered her release on bond on February 4, 2011. She was then charged as removable for violating the terms of her entry into the United States and held in ICE custody at the Colorado Detention Facility. On [REDACTED] 2011, the district attorney dismissed the initial charges against the petitioner, the judge accepted her guilty plea to the amended misdemeanor charge, sentenced her “to jail for 6 months, credit 6 months” and ordered her release. The director incorrectly determined that the petitioner was confined to jail for six months as a result of her conviction. The record shows that the petitioner was confined to jail for only 38 days and held in ICE custody, all before she was convicted on [REDACTED] 2011. The petitioner was not confined to a penal institution for 180 days or more as a result of her conviction. Rather, she was held in jail for approximately five weeks and then transferred to civil detention for five months prior to, not resulting from, her conviction. Consequently, section 101(f)(7) of the Act does not prevent a finding of her good moral character.

Primary evidence of a self-petitioner’s good moral character is his or her affidavit, which should be accompanied by local police clearances or state-issued criminal background checks. 8 C.F.R. § 204.2(c)(2)(v). In her July 23, 2012 affidavit, the petitioner explained that on the morning of her arrest, she returned home from grocery shopping to find her three-year old son crying and screaming uncontrollably. When she tried to comfort her son, he said that her boyfriend had hit him. She then confronted her boyfriend and told him to leave, but he grabbed her and began choking her. After she managed to escape his hold, she attempted to defend herself, but he called the police and accused her of attacking him. The petitioner credibly recounted her fear when the police arrived and her resultant inability to explain the situation to the reporting officers. The petitioner explained that she later received counseling which helped her understand why she had problems with abusive men and how she has learned not to become too isolated or dependent, but to rely on a good support system to avoid further endangering herself or her son. The petitioner also recounted how she has been volunteering at a community center and helping her son recover from the trauma he suffered in two abusive homes and during their separation while she was in ICE detention. The petitioner fully acknowledged her conviction and past mistakes, but asserted her belief that she is a good person with a demonstrated desire to contribute to her community, further her education and care for her son.

Other relevant evidence supports the petitioner’s claim. The record indicates that the petitioner has resided in Colorado for over a decade. The petitioner submitted a June 1, 2012 letter from the Colorado Department of Public Safety which shows her only criminal record as her 2011 misdemeanor conviction. In her June 7, 2012 affidavit, [REDACTED] the petitioner’s godmother, explains how she has known the petitioner since birth and credibly attests to the petitioner’s devotion to her son and his counseling. She recounts how the petitioner has matured

since her release from immigration detention and how her son has improved under her care. [REDACTED] a licensed clinical social worker, further attests to the petitioner's son's diagnosis with posttraumatic stress disorder and separation anxiety during his mother's detention and how imperative it is to his mental health that his mother remain his primary caretaker. [REDACTED] Director of Volunteer Services at the [REDACTED] also confirms that the petitioner has volunteered at the center's food bank, thrift store and donations area.

The petitioner's misdemeanor conviction does not fall under any enumerated bar to a finding of good moral character under section 101(f) of the Act and the preponderance of the evidence shows that the petitioner's offense was committed under extenuating circumstances. The petitioner has established her good moral character despite her offense by submitting probative primary and secondary evidence as required by the regulation at 8 C.F.R. § 204.2(c)(v). She has demonstrated that she is a person of good moral character and otherwise eligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

Conclusion

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 Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The petitioner has met her burden and the appeal will be sustained.

ORDER: The appeal is sustained.