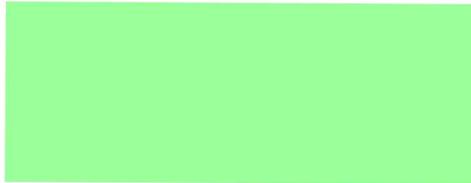


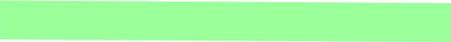
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U.S. Citizenship
and Immigration
Services

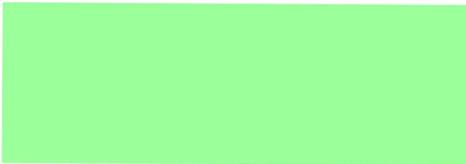


Date: DEC 04 2014 Office: VERMONT SERVICE CENTER File: 

IN RE: Self-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:

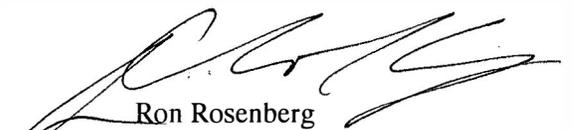


INSTRUCTIONS:

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 Vermont Service Center acting 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 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 that the petitioner resided with and entered into marriage with his wife in good faith, and that she subjected him to battery or extreme cruelty during their marriage. The director further determined that the petitioner did not establish his good moral character. On appeal, counsel submits a brief and a copy of the petitioner's criminal court docket.

Relevant Law and Regulations

Section 204(a)(1)(A)(iii)(I) 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 further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

(v) *Residence.* . . . 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 past.

(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 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. 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.

* * *

(ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

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. . . .

(iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(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. . . .

(vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

Pertinent Facts and Procedural History

The petitioner is a citizen of Mexico who claimed he first entered the United States in 1982 without inspection, admission, or parole. He married W-I-¹, a United States citizen, on February [REDACTED] in [REDACTED] Mexico. The petitioner filed the instant Form I-360 self-petition on September 28, 2012. The director denied the petition and the petitioner, through counsel, timely filed an appeal.

We review these proceedings *de novo*. A full review of the record, including the evidence submitted on appeal, fails to establish the petitioner's eligibility. The petitioner's claims and the evidence submitted on appeal do not overcome the director's grounds for denial and the appeal will be dismissed for the following reasons.

Joint Residence

The petitioner failed to establish that he resided with W-I- during their marriage. The petitioner stated on his Form I-360 self-petition that he resided with W-I- from [REDACTED] and submitted

¹ Name withheld to protect the individual's identity.

copies of a 2001 federal income tax return and immigration related forms and notices. All of the evidence submitted by the petitioner is dated in 2001 and 2002 after he and W-I- separated in [REDACTED]. In addition, the immigration notices and the tax return are all addressed solely to the petitioner. Absent probative testimony, the evidence is insufficient to establish that the petitioner and W-I- resided together during their marriage.

Traditional forms of joint documentation are not required to demonstrate a self-petitioner's joint residence. See 8 C.F.R. §§ 103.2(b)(2)(iii), 204.2(c)(2)(i). Rather, a self-petitioner may submit "affidavits or any other type of relevant credible evidence of residency." See 8 C.F.R. § 204.2(c)(2)(iii). Here, the petitioner did not submit affidavits or other relevant credible evidence to establish his residence with W-I-. On appeal, counsel asserts the documents submitted below show that the petitioner resided with W-I-, but counsel does not acknowledge the deficiencies of that evidence. Accordingly, the record does not establish that the petitioner resided with his wife, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Entry into the Marriage in Good Faith

The director also correctly determined that the petitioner did not marry W-I- in good faith. The record contains a copy of the Form I-130 visa petition filed by W-I- on behalf of the petitioner with a receipt stamp of April 30, 2001 and the petitioner's 2001 federal income tax return completed as "head of household," which does not list W-I- as his spouse. While the Form I-130 visa petition may reflect upon W-I-'s marital intentions, it is insufficient to demonstrate the petitioner's own good-faith entry into their union. Moreover, as discussed above, these documents are dated after the petitioner states he and his wife separated.

Nonetheless, traditional forms of joint documentation are not required to demonstrate a self-petitioner's entry into the marriage in good faith. See 8 C.F.R. §§ 103.2(b)(2)(iii), 204.2(c)(2)(i). Rather, a self-petitioner may submit "testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. . . . and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered." See 8 C.F.R. § 204.2(c)(2)(vii). In this case, the petitioner did not submit a personal affidavit or statements from family or friends providing any information regarding his and W-I-'s courtship, wedding ceremony, shared residence and experiences. On appeal, counsel asserts without explanation that the evidence submitted below demonstrates that the petitioner married W-I- in good faith. The preponderance of the relevant evidence does not establish that the petitioner entered into marriage with his wife in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Battery or Extreme Cruelty

The petitioner did not submit any evidence that his wife subjected him to battery or extreme cruelty during their marriage with the Form I-360 self-petition below and submits no such evidence on appeal. On appeal, counsel does not address this issue and merely reasserts the petitioner's eligibility based on unspecified evidence submitted below. The record lacks any affidavits or other relevant evidence that W-I- battered the petitioner or subjected him to extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

Good Moral Character

On June [REDACTED] the petitioner pled guilty to and was convicted of selling or transporting a controlled substance in violation of section 11352(a) of the California Health and Safety Code. The court sentenced him for to 270 days in the Los Angeles County jail with credit for 22 days actual custody and 10 days of “good time/work time.” On the same date, the court suspended imposition of the sentence and placed the petitioner on three years of probation with conditions. The director determined the petitioner’s conviction showed he was a controlled substance trafficker and consequently barred a finding of his good moral character under sections 101(f)(3) and 212(a)(2)(C) of the Act, 8 U.S.C. §§ 1101(f)(3) and 1182(a)(2)(C). The director also concluded that the petitioner was convicted of a drug trafficking aggravated felony under section 101(a)(43)(B) of the Act, further barring a determination of his good moral character under section 101(f)(8) of the Act.

On appeal, counsel submits a March 27, 2012 certified copy of the petitioner’s criminal court docket showing that on March [REDACTED] the court vacated his plea and sentence to count one, conviction for selling or transporting a controlled substance in violation of section 11352(a) of the California Health and Safety Code. The court added, *nunc pro tunc* (retroactively), a second count to the original indictment for being an accessory to a felony in violation of section 32 of the California Penal Code. The court convicted the petitioner of this second count with the same original sentence for count one. The court docket shows that the petitioner’s controlled substance conviction was vacated pursuant to section 1016.5 of the California Penal Code regarding a required advisement to defendants prior to a court’s acceptance of a plea of guilty or *nolo contendere* (no contest).

A conviction vacated due to a legal defect in the underlying proceedings is no longer valid for immigration purposes. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006). In this case, the petitioner’s plea and sentence to a controlled substance offense were vacated due to the court’s failure to first advise the petitioner of possible adverse immigration consequences of the conviction, as required by section 1016.5 of the California Penal Code. Accordingly, the petitioner’s conviction was vacated due to a legal defect in the underlying proceedings and is not valid for immigration purposes. The vacated conviction consequently does not bar a finding of his good moral character under sections 101(a)(43)(B), 101(f)(3) and (8), and 212(a)(2)(A)(i)(II) and (a)(2)(C) of the Act.

Nonetheless, the petitioner has failed to submit primary evidence of his good moral character required by regulation. Primary evidence of a petitioner’s good moral character is the petitioner’s self-affidavit accompanied by local police clearances or state criminal background checks from each place the petitioner has lived for at least six months during the three-year period immediately preceding the filing of the self-petition (in this case during the period beginning in September of 2009 and ending in September of 2012). 8 C.F.R. § 204.2(c)(2)(v). The petitioner did not submit a personal affidavit attesting to his good moral character or explaining the circumstances surrounding his conviction as an accessory to a felony. He also did not submit any local police clearances or state criminal background checks or an explanation of his inability to obtain those documents accompanied by other relevant evidence. Consequently, the petitioner has not established his good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Conclusion

On appeal, the petitioner does not demonstrate that he entered into marriage with his wife in good faith, that they resided together and that she battered or subjected him to extreme cruelty during their marriage. The petitioner also fails to establish 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 Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met. The appeal will be dismissed and the petition remains denied.

ORDER: The appeal is dismissed.