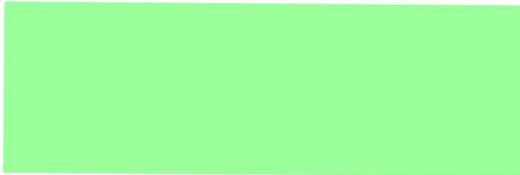


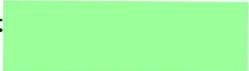
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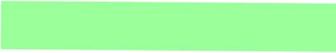
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



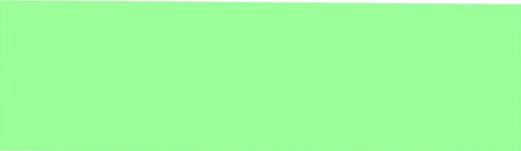
U.S. Citizenship
and Immigration
Services



Date: DEC 17 2014 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)

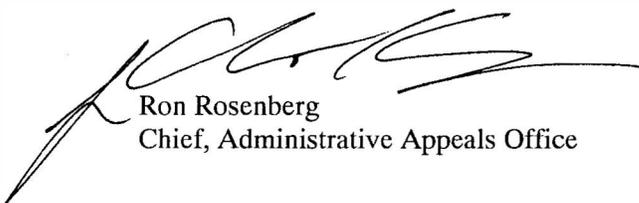
ON BEHALF OF PETITIONER:


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.

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 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 his U.S. citizen spouse.

The director denied the petition for failure to establish that the petitioner was a person of good moral character.

On appeal, counsel submits a brief and additional documents.

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 Nigeria who entered the United States as a nonimmigrant visitor on [REDACTED] 1989. The petitioner married E-T-¹, a U.S. citizen, on [REDACTED] 2010 in [REDACTED]

¹ Name withheld to protect the individual's identity.

Oregon. The petitioner was convicted of reckless driving in 1999 and of driving under the influence (DUI) in 2011. The petitioner filed the instant Form I-360 self-petition on June 24, 2013. The director subsequently issued a Notice of Intent to Deny (NOID) the petition because she determined that the petitioner did not establish his good moral character. The director found the petitioner's response to the NOID insufficient to establish his good moral character and denied the petition. The petitioner, through counsel, timely appealed.

We review these proceedings *de novo*. A full review of the record, including counsel's claims and the evidence submitted on appeal, overcome the director's ground for denial. The appeal will be sustained for the following reasons.

Good Moral Character

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 petitioner was convicted of reckless driving on [REDACTED] 1999, and sentenced to 365 days in prison with 365 days suspended. On [REDACTED] 2011, the petitioner was convicted of driving under the influence and sentenced to 364 days in jail with 184 days suspended. The petitioner was credited four days for actual time served and was allowed to complete the remaining 176 days of his sentence at home under electronic home monitoring (EHM). The director determined that the combination of the petitioner's four days served in actual prison and 176 days served under home confinement statutorily barred him from establishing good moral character pursuant to section 101(f)(7) of the Act because he was confined to a penal institution for at least 180 days. On appeal, counsel asserts that section 101(f)(7) of the Act is inapplicable because the petitioner was permitted to reside at his home under EHM which does not qualify as confinement to a penal institution. The record supports counsel's claims.

The plain language of section 101(f)(7) of the Act requires confinement to a "penal institution," defined by Black's Law Dictionary as a jail, prison or other correctional facility. Black's Law Dictionary 1246 (9th ed. 2009). *Compare Gomez-Lopez v. Ashcroft*, 393 F.3d 882 (9th Cir. 2004) (incarceration in county jail for manslaughter conviction falls within plain meaning of confinement to a penal institution under section 101(f)(7) of the Act) and *Matter of Valdovinos*, 18 I&N 343 (BIA 1982) (incarceration at minimum security work furlough facility constituted confinement to a penal institution) with *Matter of Gantus-Babadilla*, 13 I&N Dec. 777, 780 (BIA 1971) (criminal sentence of probation without incarceration does not fall within section 101(f)(7) of the Act).

In her decision, the director erroneously relied on *Ilchuk v. Attorney General of the U.S.*, 434 F.3d 618 (3rd Cir. 2006), which is neither applicable nor binding on the petitioner's case. *Ilchuk* was decided by the U.S. Court of Appeals, Third Circuit and is not binding on this case, which arose within the jurisdiction of the Ninth Circuit. *Ilchuck* is also inapplicable to this case because it concerned the interpretation of "term of imprisonment" under section 101(a)(43)(G) of the Act, which defines an aggravated felony as "a theft offense ... or burglary offense for which the term of imprisonment [is] at least one year." In determining that house arrest with electronic monitoring constituted imprisonment under the theft aggravated felony definition, the Third Circuit relied on section 101(a)(48)(B) of the Act's prescription that any reference to a "term of imprisonment"

includes “any suspension of the imposition or execution of that imprisonment . . . in whole or in part.” Section 101(f)(7) of the Act, by contrast, contains no reference to any “term of imprisonment,” but rather requires actual confinement, “as a result of a conviction, to a penal institution.”

The record shows that the petitioner was confined to jail for only four days before being allowed to fulfill the remainder of his 180-day sentence under EHM. In Washington, courts may impose home detention as a sentencing alternative. Home detention is defined as “a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance.” WASH. REV. CODE § 9.94A.030 (West 2014). Participation in a home detention program requires the offender to maintain or obtain employment, attend school regularly or perform parental duties. WASH. REV. CODE § 9.94A.734(4)(a) (West 2014). As the petitioner attests on appeal, during his time on EHM, he maintained his employment, as required, and also engaged in his other life activities, such as grocery shopping and attending church. The petitioner indicates that he could go wherever he needed as long as he informed the monitoring company in advance. The petitioner’s alternative sentence to EHM did not involve confinement to a penal institution as he was allowed to work and live at his home. Section 101(f)(7) of the Act is inapplicable to his case and the director’s contrary determination is hereby withdrawn.

The petitioner’s convictions do not fall under any enumerated bar to a finding of good moral character under section 101(f) of the Act and the record indicates that he has committed no further offenses. In addition, the petitioner submitted personal statements attesting to his good moral character and describing the circumstances surrounding his arrests and subsequent convictions pursuant to the regulation at 8 C.F.R. § 204.2(c)(2)(v). The record also contains letters of support from the petitioner’s friends, colleagues, and members of his church attesting to his good work ethic and compassion for others. On appeal, the petitioner has established his good moral character and eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

Conclusion

The petitioner bears the burden of proof to establish his eligibility by a preponderance of the evidence. See Section 291 of the Act, 8 U.S.C. § 1361; see also *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 his burden and the appeal will be sustained.

ORDER: The appeal is sustained.