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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: **JUL 01 2014**

Office: VERMONT SERVICE CENTER File: [REDACTED]

IN RE: Petitioner: [REDACTED]

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

ON BEHALF OF PETITIONER:

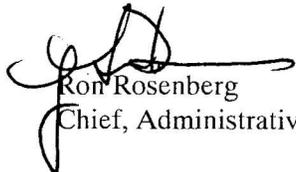
SELF-REPRESENTED

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. The Administrative Appeals Office (AAO) dismissed the subsequent appeal and affirmed its decision upon granting the petitioner's subsequent motion to reopen or reconsider. The matter is now before the AAO on a second motion to reopen and reconsider. The motion to reconsider will be granted. The appeal will remain dismissed and the petition will remain denied.

The petitioner seeks immigrant classification under section 204(a)(1)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by a lawful permanent resident of the United States.

The director denied the petition for failure to establish that the petitioner had a qualifying relationship with his lawful permanent resident spouse and that he was eligible for immigrant classification based on that relationship; that he was subjected to battery or extreme cruelty by his spouse; and that he is a person of good moral character.

Applicable Law

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a lawful permanent resident of the United States may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the permanent resident 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 for classification under section 203(a)(2)(A) of the Act as the spouse of a lawful permanent resident, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II). An alien who has divorced an abusive lawful permanent resident 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 lawful permanent resident spouse." Section 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(aa)(CC)(bbb).

Section 204(a)(1)(J) of the Act 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 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 . . . lawful permanent resident 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. 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:

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 212(a)(2) [8 U.S.C. § 1182(a)(2)] . . . if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

* * *

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. . . .

As referenced in section 101(f)(3) of the Act, section 212(a)(2)(A) of the Act, includes, "any alien convicted of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime."

The evidentiary standard and guidelines for a self-petition filed under section 204(a)(1)(B)(ii) of the Act are explained further 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.

* * *

(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. . . . 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.

Facts and Procedural History

As the facts have been outlined in our two previous decisions, they will not be fully repeated here. Our prior two decisions, dated July 17, 2013 and December 24, 2013, are incorporated here by reference. The petitioner married his wife, a lawful permanent resident, on November 2, 1995 in India. The petitioner, a citizen of India, last entered the United States on March 28, 2007 as the spouse of a nonimmigrant temporary worker. The petitioner and his wife divorced on September 17, 2008. The petitioner filed his Form I-360 on September 13, 2010, and it was denied on December 12, 2011. We dismissed the petitioner's subsequent appeal in a decision dated July 17, 2013, and the petitioner filed a motion to reopen and reconsider. In a decision dated December 24, 2013, we reaffirmed that the petitioner had not established that he had a qualifying relationship with his lawful permanent resident spouse and was eligible for immigrant classification based on that relationship, that he was subjected to battery or extreme cruelty by his wife, or that he is a person of good moral

character.

On the present motion, the petitioner contends that he has established the necessary requirements. In support of his claim, he submits a brief, a copy of a non-precedent AAO decision unrelated to his case, and a medical report from [REDACTED] Hospital. In his brief, the petitioner cites to case law to establish that the AAO's prior decision was based on an incorrect application of law, as required for a motion to reconsider at 8 C.F.R. § 103.5(a)(3). The petitioner also contends that the AAO's prior decision was incorrect based on the evidence of record at the time. *See* 8 C.F.R. § 103.5(a)(3) (prescribing this additional requirement). The petitioner's submission meets the requirements for a motion to reconsider. Accordingly, the motion to reconsider is granted. However, a full review of the record fails to demonstrate the petitioner's eligibility for the following reasons.

Analysis

In our prior decisions, incorporated here by reference, we fully discussed the pertinent facts and relevant evidence submitted below. Accordingly, we will only address the evidence submitted after those decisions were issued.

Battery or Extreme Cruelty

The director determined that the petitioner had not established the requisite battery or extreme cruelty. On motion, the petitioner again repeats his contention that his ex-wife removing the petitioner from their home and not supporting him constitutes extreme cruelty and cites to Tennessee Annotated Code § 39-15-101 which lists "non-support and flagrant non-support" as a misdemeanor criminal offense. The record still does not show that the petitioner's ex-wife's behavior involved threatened violence, psychological or sexual abuse, or otherwise constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi). There is no indication that the petitioner's wife's non-physical behavior was accompanied by coercive actions, threats of harm, or was otherwise part of an overall pattern of violence. Furthermore, the standard for a criminal statute in Tennessee has no relevance to the standard for battery or extreme cruelty as required under section 204(a)(1)(B)(ii) of the Act. Similarly, the medical report submitted on motion does not provide any specific new facts or information regarding the acts committed against the petitioner by his ex-wife. The record below and on appeal does not establish that the petitioner's ex-wife subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(B)(ii)(I)(bb) of the Act.

Qualifying Relationship and Eligibility for Immigrant Classification

As stated in our prior decisions, the petitioner has failed to demonstrate that he had a qualifying relationship with a U.S. citizen and that he is eligible for immediate relative classification based on such a qualifying relationship. On motion, the petitioner contends that because the petitioner was a lawful permanent resident and they were married, and because "abuse has a wide meaning," he had a qualifying relationship with his spouse. However, "battery or extreme cruelty" in the context of a Form I-360 petition is defined at 8 C.F.R. § 204.2(c)(1)(vi). As the petitioner 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, as required under section 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb) of the Act. Consequently, the petitioner has not demonstrated that he had a qualifying relationship with his ex-wife and was eligible for immediate relative classification based on their relationship, as required by subsections 204(a)(1)(B)(ii)(II)(aa) and (cc) of the Act.

Good Moral Character

The director determined and we affirmed that the petitioner has been convicted of a crime involving moral turpitude and is therefore precluded from establishing his good moral character under section 101(f)(3) of the Act. As stated in our previous decisions, the petitioner was convicted of domestic battery and pled guilty to the use or attempted use of physical force against his ex-wife. Our prior decisions are incorporated here and as such, we will only address the new assertions made on appeal.

In his brief, the petitioner again claims that his conviction was as a result of a conspiracy against him, and that he was the victim of ineffective assistance of counsel because he was not informed of the immigration consequences of his plea. However, the petitioner does not dispute his conviction, and the AAO may only look to the judicial records to determine whether a petitioner has been convicted of a crime involving moral turpitude, and may not go behind the record of conviction to reach an independent determination concerning guilt or innocence. *See Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995); *Gouveia v. INS*, 980 F.2d 814, 817 (1st Cir. 1992); *Matter of Roberts*, 20 I&N Dec. 294, 301 (BIA 1991). Furthermore, with regard to his claim of ineffective assistance of counsel, as stated in our previous decisions, the petitioner has not complied with the requirements of *Matter of Lozada*. 19 I&N Dec. 637 (BIA 1988), *aff'd* 857 F.2d 10 (1st Circuit 1988). The petitioner asserts that he tried to lodge a complaint but ultimately withdrew it, but he does not offer any evidence to support his contention, nor does he support the claim with an affidavit. The petitioner also cites to *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), but that case offers potential relief through vacatur of his criminal conviction, which is a collateral matter that does not affect his Form I-360 filing unless the petitioner succeeds in getting his criminal conviction vacated. The petitioner has not provided any evidence to show that his criminal conviction has been vacated or overturned.

On motion, the petitioner also claims that the AAO erred by not considering the fact that the petitioner had no record prior to his conviction for domestic battery, and cites to two non-precedent cases; an unreported Sixth Circuit case and an unreported AAO decision, for support. First, the Sixth Circuit case is not applicable to the petitioner's case as it discusses whether the respondent was deportable under 8 U.S.C. § 1227(a)(2)(A)(i), not whether she had established good moral character in order to establish eligibility under section 204(a)(1)(B)(ii) of the Act. Secondly, the AAO decision the petitioner cites to does not hold any precedential value, and each case is reviewed on its own merits. *See* 8 C.F.R. § 103.3(c). Furthermore, unlike in the present case, the petitioner in the AAO's unpublished decision established that her criminal conduct was connected to the battery or extreme cruelty perpetrated by her lawful permanent resident spouse, and her convictions did not involve the use of physical force against another.

Lastly, the petitioner asserts that our previous decisions are in violation of the Equal Protection Clause of the Fourteenth Amendment because the denial shows gender bias. The petitioner did not offer any evidence of gender bias, and we find no evidence of such in the director's or the two previous AAO decisions. The petitioner's conviction for domestic battery is a crime involving moral turpitude that bars a finding of his good moral character pursuant to section 101(f)(3) of the Act. The petitioner has therefore failed to establish his good moral character, as required by section 204(a)(1)(B)(ii)(II)(bb) of the Act.

Conclusion

On motion, the petitioner has failed to overcome the director's determination that he is not a person of good moral character and that he failed to establish that his ex-wife subjected him to battery or extreme cruelty, that he had a qualifying relationship with his lawful permanent resident spouse, or that he was eligible for immigrant classification based on that relationship. He is consequently ineligible for immigrant classification under section 204(a)(1)(B)(ii) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion is granted. The AAO's prior decisions, dated July 17, 2013 and December 24, 2013, are affirmed. The appeal remains dismissed and the petition remains denied.