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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: **OCT 01 2014** Office: VERMONT SERVICE CENTER File: [REDACTED]

IN RE: Self-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)

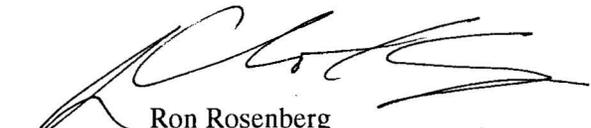
ON BEHALF OF PETITIONER:

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. 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 is a person of good moral character.

On appeal, counsel submits a statement and additional evidence.

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 101(f) of the Act, 8 U.S.C. § 1101(f), states, in pertinent part, that:

For the purposes of this Act – 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 ... subparagraph[] (A) ... of section 212(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

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

Section 204(a)(1)(C) of the Act states:

Notwithstanding section 101(f), an act or conviction that is waivable with respect to the petitioner for purposes of a determination of the petitioner's admissibility under section 212(a) or deportability under section 237(a) shall not bar the Attorney General from finding the petitioner to be of good moral character under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) if the

Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty.

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 Mexico who claims he entered the United States in December of 1997 without being inspected. The petitioner married L-M¹, a U.S. citizen, in [REDACTED] Nevada on February [REDACTED]. The petitioner filed the instant Form I-360 self-petition on November 1, 2011. The director subsequently issued a Notice of Intent to Deny (NOID) the petition for failing to establish, among other things, the petitioner's good moral character. The petitioner, through counsel, timely responded with additional evidence which the director found insufficient to establish the petitioner's good moral character. The director denied the petition and counsel appealed.

We review these proceedings *de novo*. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record as supplemented on appeal, fails to establish the petitioner's eligibility. The petitioner has not overcome the director's ground for denial and the appeal will be dismissed.

Good Moral Character

The petitioner's criminal record shows he lacks good moral character. The petitioner was twice convicted under section 273a of the California Penal Code (CPC):

(a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

(b) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

CAL. PENAL CODE § 273a (West 2007).

¹ Name withheld to protect the individual's identity.

On July 17, 2007, the petitioner entered a plea of guilty and was convicted of three counts of willful harm or injury to a child in violation of CPC § 273a(a). The petitioner was sentenced to seven days in jail, four years of informal probation, completion of the Child Abuser's Treatment Program, and eight hours of community service.²

On October 25, 2011, the petitioner entered a plea of guilty and was convicted of two additional counts of willful harm or injury to a child in violation of CPC § 273a(b).³ The petitioner was sentenced to four years of informal probation, eight hours of community service, contribution to the Victim/Witness Emergency Fund, and participation in the Child Abuser's Treatment Program. The criminal court case summary shows that the petitioner remains on probation for this offense until October 24, 2015.

The petitioner's 2007 offense was a crime involving moral turpitude and section 101(f)(3) of the Act consequently bars a finding of his good moral character. The Ninth Circuit Court of Appeals, within whose jurisdiction this case arose, has classified crimes involving moral turpitude as "those involving fraud and those involving grave acts of baseness or depravity." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009) (quoting *Carty v. Ashcroft*, 395 F.3d 1081, 1083 (9th Cir.2005)). To determine whether an offense is a crime involving moral turpitude we first apply a categorical approach. *Id.* at 912. If the statute of conviction criminalizes conduct that does and does not involve moral turpitude, we apply the modified categorical approach. *Id.* Under the modified categorical approach, we examine the record of conviction to determine whether or not the alien was convicted of elements of a crime involving moral turpitude. *Id.* The record of conviction includes the indictment, judgment of conviction, a signed guilty plea or the transcript of the plea proceedings. *Id.* When applying the modified categorical approach, we cannot consider evidence outside of the record of conviction. *Olivas-Motta v. Holder*, 746 F.3d 907, 916 (9th Cir. 2013).

Section 273a(a) of the CPC categorically involves moral turpitude because it requires willful actions that result in unjustifiable pain or suffering, injury or endangerment to a child under circumstances likely to produce great bodily harm or death. *See Hernandez-Perez v. Holder*, 569 F.3d 345 (8th Cir. 2009) (child endangerment under Iowa law involves moral turpitude because it requires a conscious disregard of a substantial risk to a child in the offender's care). On appeal, counsel does not contest that the petitioner's 2007 conviction under CPC § 273a(a) is a crime involving moral turpitude.

We cannot determine whether or not the petitioner's 2011 conviction under CPC § 273a(b) also involves moral turpitude because section (b) of the statute is divisible, encompassing some conduct which involves moral turpitude and some which does not. Counsel did not submit a complete record of conviction for the petitioner's 2011 offense and we consequently cannot apply the modified categorical approach and examine the indictment or guilty plea to determine under which specific provision of CPC § 273a(b) he was convicted.

² Superior Court of California, [REDACTED], Case number [REDACTED]

³ Superior Court of California, [REDACTED], Case number [REDACTED]

Nonetheless, counsel does not contest on appeal the director's determination that the petitioner's 2011 conviction also involves moral turpitude. Instead, counsel claims that the petitioner's convictions were connected to his wife's abuse and consequently do not bar a finding of good moral character under section 204(a)(1)(C) of the Act. Although inadmissibility due to a conviction for a crime involving moral turpitude is waivable for self-petitioners under section 212(h)(1)(C) of the Act, the petitioner has not demonstrated a connection between his convictions and his wife's battery or extreme cruelty that would permit a finding of his good moral character despite his offenses under section 204(a)(1)(C) of the Act.

In his letter dated June 11, 2013, the petitioner stated that he feared not being able to ever see his children again and this caused him to stay married and in a situation where L-M- cared for the children while he worked. He stated that during this time, he was depressed and too tired to clean the house when he came home from work. The petitioner stated that in July of 2007, he was arrested after his neighbors called the police due to L-M-'s screaming at the children and the police saw how dirty their apartment was. The petitioner indicated that he and his wife later reconciled, but one day when he returned home to find she had left the children alone and hurt them, he called the police and they arrested him when they saw the condition of the apartment. In his December 19, 2013 letter submitted on appeal, the petitioner further states that during his marriage he worked long hours trying to escape his wife's abuse. He explains, "[m]y emotional state did not allow me to see how my children were living."

On appeal, counsel also submits a letter from psychologist [REDACTED] who confirms that he diagnosed the petitioner with major depressive disorder as a survivor of domestic violence. Mr. [REDACTED] opines that during his marriage, the petitioner "neglected his parental duties because he coped with his depression by becoming a 'workaholic'" and he was "more focused on providing monetarily for his family than on focusing on the impact of the general neglect of the children." The record establishes that L-M- subjected the petitioner and their children to battery or extreme cruelty and we do not minimize the harm she inflicted upon their family. However, the preponderance of the evidence does not show that his wife's battery or extreme cruelty caused or was otherwise connected to his willfully leaving their children with her "under circumstances and conditions likely to produce great bodily harm and death" and resulting in injury to the three children, as he pled guilty to for his 2007 offense.

The petitioner has not established that he is a person of good moral character. The petitioner was convicted of at least one crime involving moral turpitude and the petitioner has not established that his conduct was connected to his wife's abuse. Consequently, section 101(f)(3) of the Act bars a finding of his good moral character. In addition, even if the petitioner's 2011 conviction did not also involve moral turpitude, he remains on probation for this offense until October 24, 2015. On appeal, he submits no evidence that his probation was successfully terminated early and that he has fully complied with the remaining terms of his sentence and rehabilitated. The record thus still shows that the petitioner was convicted of unlawful acts which adversely reflect upon his moral character pursuant to the regulation at 8 C.F.R. § 204.2(c)(1)(vii). Accordingly, the petitioner has not established his good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Conclusion

In these proceedings, the petitioner bears the burden to establish his eligibility for the immigration benefit sought. *See* Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met and the appeal will be dismissed.

ORDER: The appeal is dismissed.