



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF P-D-S-

DATE: DEC. 14, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-360, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT

The Petitioner seeks immigrant classification as an abused spouse of a U.S. citizen. *See* Immigration and Nationality Act (the Act) § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

**I. APPLICABLE LAW**

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.

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 self-petitioner will also be found to lack good moral

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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 are further explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent parts:

(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.

## II. FACTS AND PROCEDURAL HISTORY

The Petitioner, a citizen of Bulgaria, last entered the United States on April 18, 2005, as a J-1 nonimmigrant. On [REDACTED] 2006, he married J-Q-<sup>1</sup>, a U.S. citizen, in Virginia. They were divorced on [REDACTED] 2007. The Petitioner then married his second spouse, K-C-<sup>2</sup>, also a U.S. citizen, on [REDACTED] 2007, in Nevada, and they later divorced on [REDACTED] 2010. The Petitioner then married, T-R-<sup>3</sup>, a

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<sup>1</sup> Name is withheld to protect the individual's identity.

<sup>2</sup> Name is withheld to protect the individual's identity.

<sup>3</sup> Name is withheld to protect the individual's identity.

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U.S. citizen, on [REDACTED] They were divorced on [REDACTED] 2013.

The Petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on November 13, 2012, based on his relationship with his third spouse, T-R-. The Director subsequently issued two notices of intent to deny (NOID), notifying the Petitioner that, amongst other things, he had not established his good moral character and that the record indicated that section 204(c) of the Act barred approval of the petition because substantial and probative evidence showed that he had previously entered into his marriages with J-Q- and K-C- for the purpose of evading the immigration laws. The Petitioner responded to the NOIDs with additional evidence. The Director found the evidence of record insufficient to establish the Petitioner's eligibility, and denied the petition, finding that the Petitioner had not established his good moral character and had previously entered into marriage with K-C- for the sole purpose of circumventing immigration laws. The Petitioner timely appealed.

On appeal, the Petitioner submits a brief and additional evidence. On July 8, 2015, we issued a request for evidence (RFE) establishing the Petitioner's good moral character and the *bona fides* of his former marriage to K-C-. The Petitioner responded with supplemental statements and additional evidence.

### III. ANALYSIS

We conduct appellate review on a *de novo* basis. Upon a full review of the record, as supplemented on appeal, the Petitioner has not overcome all of the Director's grounds for denial. The appeal will be dismissed for the following reasons.

#### A. Section 204(c) of the Act

Section 204(c) of the Act states, in pertinent part:

[N]o petition shall be approved if –

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative . . . status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or
- (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The regulation corresponding to section 204(c) of the Act, at 8 C.F.R. § 204.2(a)(1)(ii), states:

*Fraudulent marriage prohibition.* Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for

immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an individual who has attempted or conspired to enter into a marriage for the purpose of evading immigration laws. *See Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990) (citing *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988)). An adverse section 204(c) determination requires the denial of any subsequent visa petition for immigrant classification filed on behalf of such an individual, regardless of whether he or she ultimately received a benefit through the attempt or conspiracy. *See Tawfik*, 20 I&N Dec. at 167-68; *see also Matter of Rahmati*, 16 I&N Dec. 538, 539 (BIA 1978) (section 204(c) determination is to be made by the District Director on behalf of the Attorney General<sup>4</sup> during the adjudication of a subsequent visa petition). The evidence of the attempt or conspiracy to enter into a marriage in order to evade immigration laws must be documented in the individual's file and must be "substantial and probative." *See Tawfik*, 20 I&N Dec. at 167. U.S. Citizenship and Immigration Services (USCIS) may rely on any relevant evidence in the record, including evidence originating from prior USCIS proceedings involving the individual. *See id.*; *Rahmati*, 16 I&N Dec. at 539. However, the adjudicator must come to his or her own, independent conclusion and should not ordinarily give conclusive effect to determinations made in prior collateral proceedings. *Tawfik*, 20 I&N Dec. at 168.

Upon *de novo* review, we withdraw the Director's section 204(c) determination because it is not supported by substantial and probative evidence in the record that the Petitioner entered into marriage with his former spouse, K-C-, for the purpose of evading U.S. immigration laws. *See Tawfik*, 20 I&N Dec. at 167. The record contains a denial of the Form I-485, Application to Register Permanent Residence or Adjust Status, based on the Form I-130, Petition for Alien Relative, filed by K-C- on behalf of the Petitioner. The decision indicates that the denial of the Form I-485 was based on the fact K-C- had withdrawn the Form I-130 because the Petitioner entered into marriage with her solely to obtain immigration benefits. However, the corresponding Form I-130 decision indicated only that K-C- withdrew the petition. Her withdrawal letter stated that the Petitioner had left her and broken her heart and that she no longer loved him. The Director's first NOID regarding the instant Form I-360 cited inconsistencies in the testimony of the Petitioner and K-C- during their interviews for the Form I-130 that K-C- filed on the Petitioner's behalf as the basis for the application of the section 204(c) of the Act bar. In the subsequent denial of the Form I-360, the Director also noted that as a result of the referenced testimonial inconsistencies, a fraud investigation was conducted, revealing that the couple was not residing at the claimed marital residence. However, neither the NOID, nor the decision denying the Form I-360, identify the inconsistencies upon which the Director relied. Our review of the record discloses some inconsistencies in the testimony of the Petitioner and

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<sup>4</sup> This authority is now exercised by the Secretary of the Department of Homeland Security (Secretary).

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his spouse during their Form I-130 interview, but these inconsistencies do not constitute sufficient evidence to conclude that the Petitioner entered into the marriage to evade immigration laws.

Additionally, further review of the record, including the Petitioner and K-C-'s divorce decree and the Petitioner's Form G-325A, Biographic Form, dated August 4, 2010, demonstrates that the fraud investigation of the Petitioner's marital residence with K-C- was conducted in October 2008, approximately one month after the couple had already physically and permanently separated and moved from their marital residence. Finally, the Director's decision also cited a minor discrepancy in the documents the Petitioner submitted below in response to the NOID to establish the *bona fides* of his marriage, specifically an address on some documents that was different than the claimed marital residence. However, the cited inconsistency and other minor deficiencies noted by the Director in the documentary evidence do not support a section 204(c) of the Act determination. Moreover, in response to our RFE, the Petitioner submits an affidavit in which he discusses in probative detail his good-faith entry into his marriage with K-C-.

Accordingly, the record lacks substantial and probative evidence that the Petitioner entered into marriage with K-C- for the purpose of evading U.S. immigration laws, and thus, we withdraw the Director's determination that section 204(c) of the Act applies to bar approval of the instant petition.

#### B. Good Moral Character

Notwithstanding our withdrawal of the Director's section 204(c) determination, the instant petition may not be approved as the Petitioner has not established that he is a person of good moral character.

##### 1. The Petitioner's Criminal History

The record indicates that the Petitioner was arrested on [REDACTED] 2013, and charged with assault on a family member, a misdemeanor, in violation of section 18.2-57.2 of the Virginia Code. On [REDACTED] 2013, he pled *nolo contendere* to the charge and was placed on active probation and required to comply with court mandated conditions. On [REDACTED] 2015, the criminal charge against the Petitioner was dismissed pursuant to Va. Code Ann. § 18.2-57.3 after his successful completion of probation and a domestic violent/batterers intervention program, as well as other court ordered conditions. Although the Petitioner's criminal charges were ultimately dismissed, he remains convicted for immigration purposes.<sup>5</sup>

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<sup>5</sup> A conviction is defined under the Act as "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where: (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt; and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." Section 101(a)(48)(A) of the Act. The Board has recognized the Congressional intent behind section 101(a)(48)(A) of the Act to treat deferred adjudications or convictions that are expunged pursuant to state rehabilitative laws as convictions for immigration purposes. *Matter of Salazar*, 23 I&N Dec. 223, 230-31, 233 (BIA 2002) (holding that the respondent, whose adjudication of guilt following a guilty plea was deferred pending completion of probation, was considered to have been convicted of the offense for immigration purposes).

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Additionally, the record shows that during the pendency of this appeal, the Petitioner was again arrested on [REDACTED] 2015, and charged with threatening an illegal or immoral act over a telephone in violation of Va. Code Ann. § 18.2-427. Pursuant to a certified criminal history record issued by the Virginia Department of State Police submitted by the Petitioner in response to our RFE, the Petitioner was not prosecuted for this offense.

2. Petitioner Lacks Good Moral Character under Section 101(f) of the Act and the Regulation

The record demonstrates that the Petitioner lacks good moral character under the final paragraph of section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii). Section 101(f) of the Act states, in pertinent part, that “[t]he 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.” The regulation at 8 C.F.R. § 204.2(c)(1)(vii) further prescribes that:

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. . . .

As discussed, the Petitioner was convicted, for immigration purposes, of the offense of assault on a family member, a misdemeanor, in violation of Va. Code Ann. § 18.2-57.2. He completed probation, a domestic violent/batterers intervention program, and other court ordered conditions, including staying away from the victim of the assault, T-R-, the Petitioner’s third spouse and the mother of his child. In his written statement below responding to the Director’s second NOID, the Petitioner denies culpability and asserted that on [REDACTED], 2013, T-R- verbally attacked him when he arrived late to pick up their son. He stated that T-R- also struck him two or three times in front of their son, and that he grabbed T-R-’s wrist and pushed it away. The Petitioner recalled that he was later arrested because T-R- falsely claimed he assaulted her, even though it was T-R- who hit him. He indicated that he was prosecuted and went to a court hearing, where the police officer who took T-R-’s statement testified that he saw redness on T-R-’s wrist. The Petitioner also stated that the judge found he had used excessive force and ordered him to anger management classes. He recounted how after his attorney advised him about the possible consequences of going to trial, he became fearful and decided to plead guilty. On appeal, in response to our RFE, the Petitioner asserts that T-R- only contacted the police following this incident to have an advantage against him in their child custody battle over their son, but does not otherwise discuss his remorse or take any responsibility for the offense. Although the Petitioner denies culpability of the charge of which he was convicted, we lack authority to look behind the Petitioner’s conviction to reassess his guilt or innocence. *See Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1034 (BIA 1999) (unless a judgment is void on its face, an administrative agency cannot go behind the judicial record to determine an alien’s guilt or innocence). Accordingly, inasmuch as the Petitioner relies on his

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claimed innocence in the underlying acts leading to his conviction, he has not satisfied his burden to establish extenuating circumstances for his conviction.

Additionally, we note that the Petitioner's account of his arrest in response to the Director's second NOID is of an incident that occurred on [REDACTED] 2013, while the Virginia State Police criminal record proffered on appeal indicates that the Petitioner was arrested prior to that date in [REDACTED] 2013. The record contains no explanation for this discrepancy in the dates and it is unclear whether there were two separate incidents involving the Petitioner and T-R- in [REDACTED] and [REDACTED] 2013. The Petitioner was specifically afforded an opportunity, both below and on appeal, to supplement the record to provide arrest reports, and a full record of conviction, including charging documents, to demonstrate the underlying circumstances of his arrest and conviction, and to corroborate his account. However, the Petitioner has not proffered such documents or an explanation for why they were not submitted. Further, the record also contains a protective order issued against the Petitioner in favor of T-R- on [REDACTED] 2013. It is unclear whether the protective order relates to the incident the Petitioner described as occurring on [REDACTED] 2013.

On appeal, the Petitioner contends that he merits a finding of good moral character because he provides for his U.S. citizen son, is the only source of support for his U.S. citizen mother, and that he is a hard worker who owns a business, creates jobs, and contributes significantly to the U.S. economy. He maintains, and the record contains documentary evidence, that he successfully completed and was discharged from probation for his assault conviction and completed court ordered anger management classes, resulting in the ultimate dismissal of that charge. While the Petitioner asserts in his statements that he is a person of good moral character, his assertions are inconsistent with his conviction for assault and the protective order issued against him. Although the record also includes character reference from the Petitioner's friend, [REDACTED] she does not indicate that she has any knowledge of the Petitioner's conviction and the protection order issued against him.

Upon review of the record in totality, the Petitioner's assault conviction and the protection order issued against him, the lack of extenuating circumstances for his unlawful acts, and his lack of any accountability for his actions, evidence conduct that falls below the average citizen in the community and adversely reflect upon his moral character pursuant to the final paragraph of section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii). The Petitioner has therefore not demonstrated his good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

#### IV. CONCLUSION

On appeal, the Petitioner has demonstrated that section 204(c) of the Act does not bar approval of the instant petition as the record does not contain substantial and probative evidence that the Petitioner entered into his prior marriage for the purpose of evading U.S. immigration laws. However, the petition is not approvable because he has not established that he is a person of good moral character. The Petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

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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 appeal is dismissed.

Cite as *Matter of P-D-S-*, ID# 13047 (AAO Dec. 14, 2015)