

(b)(6)



U.S. Citizenship
and Immigration
Services

Date: JAN 30 2015 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.

Thank you,

A handwritten signature in cursive script that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, (“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 and the petition will be approved.

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, the petitioner submits a brief 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.

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:

Evidence for a spousal self-petition –

(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 Belize who entered the United States on January 15, 1994 as a nonimmigrant visitor. The petitioner married his second spouse, K-B-, a U.S. citizen, on September [REDACTED] in Illinois.¹ The petitioner filed the instant Form I-360 on January 27, 2012. The director subsequently issued a Notice of Intent to Deny (NOID) for failure to establish the petitioner's good moral character. The petitioner responded with additional evidence which the director found insufficient to establish the petitioner's eligibility. The director denied the petition and the petitioner appealed. We subsequently issued a request for additional evidence of the petitioner's good moral character. The petitioner timely responded to our RFE with the requested evidence.

We conduct appellate review on a *de novo* basis. A full review of the record, including the evidence submitted on appeal, establishes the petitioner's eligibility. The petitioner's arguments and the evidence submitted on appeal have overcome the director's ground for denial and the appeal will be sustained for the following reason.

¹ Name withheld to protect the individual's identity.

Analysis

Section 101(f)(3) of the Act prescribes, in pertinent part, that no person shall be found to have good moral character if he or she is a member of one or more of the classes of persons, whether inadmissible or not, described in subparagraph (A) of section 212(a)(2) of the Act. The final paragraph at 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.” In this case, the director determined that the petitioner was convicted of a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act and his conviction is not eligible for the petty offense exception. In addition, the director determined that the petitioner’s conviction is an unlawful act which adversely reflects 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’s conviction record shows that on May [REDACTED] he was convicted of a misdemeanor violation of section 273.5(a) of the California Penal Code (CPC), willful infliction of corporal injury on a spouse, cohabitant or the mother or father of the offender’s child. He was placed on summary probation for a period of 36 months under the conditions that he serve 45 days in the [REDACTED] county jail, and pay designated fees. The petitioner was instructed that in lieu of jail, he could perform 30 days of community service, pay fines and enroll in a 12-month batterer’s counseling program. Because the petitioner failed to comply with the terms of his probation, the court revoked his probation on June 26, 1996 and a bench warrant was issued. On March [REDACTED] the petitioner reappeared in court and his probation was modified to require that the petitioner serve an additional 120 days in the [REDACTED] county jail. The court stipulated that the petitioner’s probation would terminate upon his release from jail. On April [REDACTED], the petitioner surrendered for 120 days in the county jail. In response to the RFE, the petitioner submits an electronic docket, dated October 14, 2014, which shows that the petitioner appeared in court to surrender for 120 days in the county jail.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
 - (ii) Exception.--Clause (i)(I) shall not apply to an alien who committed only one crime if . . .
 - (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months

(regardless of the extent to which the sentence was ultimately executed).

At the time of the petitioner's conviction section 273.5 of the CPC provided, in pertinent part:

- (a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person with whom he or she is cohabiting, or any person who willfully inflicts upon any person who is the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both.

Cal. Penal Code 2735 (West 1996).

On appeal, the petitioner asserts that even if he was convicted of a crime involving moral turpitude, he would be eligible for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act as the crime for which he was convicted did not carry a maximum penalty of more than one year imprisonment and he was sentenced to less than six months imprisonment. According to section 273.5(a) of the CPC, a person convicted under the statute is "guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment." Because the offense can result in a range of punishments, it is referred to as a "wobbler" statute, providing for either a misdemeanor or a felony conviction. *Ceron v. Holder* 747 F.3d 773, 777 (9th Cir. 2014). As previously discussed, the petitioner was convicted of a misdemeanor violation of section 273.5(a) of the CPC and placed on summary probation for a period of 36 months under the conditions that he serve 45 days in the Los Angeles county jail. He later reappeared in court and his probation was modified to require that he serve an additional 120 days in the Los Angeles county jail. The Board of Immigration Appeals (BIA) in *Matter of Ramirez* held that "[w]here a criminal alien's sentence has been modified to include a term of imprisonment following a violation of probation, the resulting sentence to confinement is considered to be part of the penalty imposed for the original underlying crime, rather than punishment for a separate offense." 25 I&N Dec. 203, 206 (BIA 2010). Therefore, the petitioner was sentenced to 165 days in the county jail for a violation of section 273.5(a) of the CPC. The BIA explained, "[w]hen read in conjunction with section 17 of the California Penal Code it is clear that the provision in section 273.5(a) allowing for imprisonment in a county jail for not more than 1 year is the maximum possible punishment for a misdemeanor."² *Id.* Since the penalty for the offense did not exceed

² The BIA further explained, "[u]nder section 17 of the California Penal Code, a felony is a crime that is punishable by death or imprisonment in the State prison. Every other crime or public offense is a misdemeanor, except those offenses classified as infractions. The statute further states that when a crime is punishable, in the discretion of the court, by imprisonment in the State prison or by a fine or imprisonment in the county jail, it is a misdemeanor under a number of circumstances, including after a judgment imposing a punishment other than imprisonment in the State prison." *Id.* at 206-07.

imprisonment for one year and the petitioner received an actual sentence of less than six months, he qualifies for the petty offense exception. Consequently, section 101(f)(3) of the Act does not apply because even if the petitioner was convicted of a crime involving moral turpitude he is eligible for the petty offense exception to section 212(a)(2)(A)(i)(I) of the Act.

The petitioner further asserts that he should not be found to lack good moral character on discretionary grounds because he has not had any other criminal convictions and he is the sole provider for his U.S. citizen daughter. Primary evidence of a self-petitioner's good moral character is his or her affidavit, which should be accompanied by local police clearances or state-issued criminal background checks 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 (in this case from January 2009 until January 2012). 8 C.F.R. § 204.2(c)(2)(v).

The petitioner explained that he was arrested for a violation of section 273.5(a) of the CPC for an incident involving his first wife, M-B-. He stated that he and M-B- were separated when he contacted her on May [REDACTED] and was invited to her brother's home. When the petitioner arrived at his brother-in-law's house he claimed that he attempted to speak with M-B- in private. He stated that after he approached M-B-, her brother and her boyfriend physically assaulted him. He indicated that the police arrived after the incident was over and the petitioner was arrested. The petitioner and M-B- divorced in November [REDACTED]. The petitioner wed his second spouse, K-B-, on September [REDACTED] and their daughter was born on February [REDACTED]. The petitioner has submitted evidence to establish that K-B- abused alcohol and became physically and verbally abusive towards him. He claimed that he was afraid because of K-B-'s threats that he would be deported if he contacted the police. The couple separated on November [REDACTED] and initially they agreed to joint custody of their daughter. The petitioner stated that K-B-'s alcohol abuse continued and she frequently appeared at the petitioner's home unannounced while she was intoxicated. The petitioner recounted that in March 2011 K-B- physically assaulted the petitioner and he reported this assault to the police. K-B- then fled her home with her boyfriend and she took the petitioner's daughter with her. The petitioner hired a private detective and lawyer to help him find K-B- and his daughter. After the detective located them, the petitioner stated that K-B- acknowledged her instability and admitted that she planned to move to another state. She agreed in writing to give the petitioner full custody of their daughter. A court in Illinois granted the petitioner sole custody of his daughter in August [REDACTED]. The petitioner has since focused on raising his daughter and he has been successful with his home repair and remodeling business. *See Petitioner's Affidavit*, dated January 6, 2012.

The petitioner added in subsequent statements that he and his daughter have attended counseling sessions. He stated that he is involved in his daughter's education and volunteers for school and community activities, including his role as a parent representative member of the Local School Council. The petitioner stated that he is the sole financial provider for his daughter and files his annual tax returns. He maintains that he has not had any other convictions or arrests over the past 18 years. Despite the abuse he suffered, the petitioner indicated that he recognizes that it is beneficial for his daughter to have a relationship with her mother and he entered into a verbal agreement with K-C- to allow her to see their daughter one weekend every month. *See Petitioner's Declarations*, dated January 14, 2014 and October 8, 2014.

Relevant evidence in the record supports the petitioner's assertions. The petitioner stated in his October 8, 2014 declaration that he has resided in [REDACTED] Illinois from the period of January [REDACTED] until present. The petitioner submitted a letter from the [REDACTED] Police Department, dated October 10, 2014, which states that the petitioner does not have any criminal violations within its records system. The petitioner also submitted an October 14, 2012 letter from the [REDACTED] Police Department, which states that it found no conviction records for the petitioner. The petitioner further submitted: his daughter's birth certificate; an October 3, 2011 court order granting the petitioner sole custody of his daughter; his daughter's school records and proof of her medical benefits; a copy of his 2013 U.S. Individual Tax Return (Form 1040); and supporting letters attesting to his good moral character. [REDACTED] School Clerk of [REDACTED] in [REDACTED] stated in her May 6, 2014 letter that the petitioner serves as a Local School Council member at the school. [REDACTED] Program Director of the [REDACTED] [REDACTED] stated that the petitioner has demonstrated ongoing care and responsibility for his daughter. [REDACTED] Ph.D. with [REDACTED] stated that the petitioner attended counseling with her and disclosed the spousal abuse he suffered. She opined that during the course of counseling the petitioner has gained awareness about his issues and is working on forgiveness, regaining self-esteem and he plans to continue counseling to reach his treatment goals. The petitioner's friends, [REDACTED] also attest to the petitioner's good moral character, work ethic and commitment to raising his daughter.

None of the enumerated bars to a finding of good moral character under section 101(f) of the Act apply in this case and the petitioner has not been arrested or convicted of any other offenses over the past 18 years. The petitioner has established his good moral character despite his offense by submitting probative primary and secondary evidence as required by the regulation at 8 C.F.R. § 204.2(c)(v). He has demonstrated that he is a person of good moral character and otherwise eligible 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. 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). The petitioner has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.