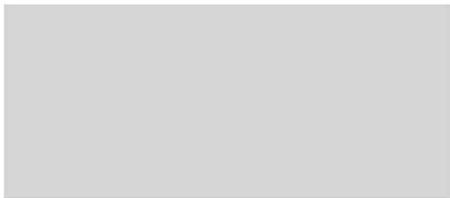




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 23 2015**

FILE #: [REDACTED]

PETITION RECEIPT #: [REDACTED]

IN RE: 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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

*R*Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks immigrant classification under 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 United States citizen spouse.

The director denied the petition on the basis that the petitioner did not establish that he is a person of good moral character. On appeal, the petitioner submits a brief, a supplemental personal statement, and internet printouts from the [REDACTED] library.

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 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 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)(1), which states, in pertinent part:

(v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser in the United States in the past.

* * *

(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.

* * *

(ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

The evidentiary guidelines 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.

* * *

(iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

* * *

(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.

* * *

(vii) *Good faith marriage*. Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

In addition, the regulations require that to remain eligible for immigration classification, a self-petitioner must comply with the provisions of section 204(g) of the Act. 8 C.F.R. § 204.2(c)(1)(iv).

Section 204(g) of the Act, 8 U.S.C. § 1154(g), prescribes:

Restriction on petitions based on marriages entered while in exclusion or deportation proceedings. – Notwithstanding subsection (a), except as provided in section 245(e)(3), a petition may not be approved to grant an alien immediate relative status or preference status by reason of a marriage which was entered into during the period [in which administrative or judicial proceedings are pending], until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.

Section 245(e) of the Act, 8 U.S.C. § 1255(e), provides an exception to section 204(g) of the Act as follows:

Restriction on adjustment of status based on marriages entered while in exclusion or deportation proceedings –

- (1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a).
- (2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.
- (3) Paragraph (1) and section 204(g) shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the [Secretary of Homeland Security] that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage

was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) . . . with respect to the alien spouse or alien son or daughter. In accordance with the regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

The corresponding regulation at 8 C.F.R. § 245.1(c)(8)(v) states, in pertinent part:

Evidence to establish eligibility for the bona fide marriage exemption. Section 204(g) of the Act provides that certain visa petitions based upon marriages entered into during deportation, exclusion or related judicial proceedings may be approved only if the petitioner provides clear and convincing evidence that the marriage is bona fide. . . .

Pertinent Facts and Procedural History

The petitioner, a citizen of India, last entered the United States on February 2, 1997, on a nonimmigrant C-1 transit visa. The petitioner was placed into removal proceedings on September 5, 2007 and subsequently married T-N-¹, a U.S. citizen, on [REDACTED], 2008 in Nevada. T-N- filed a petition for alien relative (Form I-130) on behalf of the petitioner, which was approved on April 28, 2010. On November 8, 2011, an immigration judge denied the petitioner's related application for adjustment of status (Form I-485), and granted him voluntary departure. The Board of Immigration Appeals dismissed a subsequent appeal and granted the petitioner voluntary departure on April 7, 2014. The petitioner filed the instant Form I-360 self-petition on June 30, 2014 based on his spousal relationship with T-N-. The director issued a Notice of Intent to Deny (NOID) the petition because the evidence did not establish, among other things, 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 timely appealed.

We review these proceedings *de novo*. Upon a full review of the record, as supplemented on appeal, the petitioner has not overcome the director's ground for denial as he has not demonstrated that he is a person of good moral character. Beyond the director's decision, the petitioner has not established that he entered into his marriage with T-N- in good faith and resided with her.² In addition, the record does not establish the bona fides of the petitioner's marriage to T-N- by clear and convincing evidence, and thus approval of the instant petition is barred by section 204(g) of the Act. The appeal will be dismissed for the following reasons.

¹ Name is withheld to protect the individual's identity.

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

Good Moral Character

The director correctly determined that the petitioner did not establish his good moral character as required. The record shows the petitioner lacks good moral character under the last 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.

The record indicates that, on [REDACTED] 2002, the petitioner pled no contest to and was convicted of Assault with Force Likely to Produce Great Bodily Injury³, a felony, in violation of section 245(a)(1) of the California Penal Code (West 2001), for which he was sentenced to six days in jail and five years of probation.⁴ The petitioner was initially arrested on charges of Kidnapping (CAL. PENAL CODE § 207), Corporal Injury to a Spouse/Cohabitant/Child’s Parent (CAL. PENAL CODE § 273.5(a)), False Imprisonment by Violence (CAL. PENAL CODE § 236), Criminal Threats (CAL. PENAL CODE § 422), and Damage to Electric/Power Lines (CAL. PENAL CODE § 591). The victim of the petitioner’s offense was his first wife, who is also the mother of his daughter. The record indicates that the petitioner subsequently violated a related domestic violence restraining order.

³ The Court of Appeals for the Ninth Circuit has recognized Assault with Deadly Weapon or Force Likely to Produce Great Bodily Injury under CAL. PENAL CODE § 245(a)(1) as a divisible statute that can be separated into two discrete offenses. *See Ceron v. Holder*, 747 F.3d 773, 776 n.1 (9th Cir. 2014) (relying on *Descamps v. U.S.*, 133 S.Ct. 2276, 2281 (2013) to recognize CAL. PENAL CODE § 245(a)(1) as a divisible statute because it can be violated either through the use of a deadly weapon or by force likely to produce great bodily injury). As the statute here is divisible, the modified categorical approach may be applied to look beyond the conviction to the underlying record of conviction, which indicates that the petitioner was convicted under the second prong of CAL. PENAL CODE § 245(a)(1) relating to the commission of the offense through use of force likely to produce great bodily injury. *See, e.g., Descamps*, 133 S.Ct at 2283-84.

⁴ The director did not address below whether the petitioner’s conviction constituted a crime involving moral turpitude (CIMT), which would statutorily bar a finding of his good moral character under section 101(f)(3) of the Act. As we have determined that the petitioner lacks good moral character for other reasons, it is unnecessary to address the CIMT issue here. However, the petitioner is notified that in any subsequent proceeding, he must address whether his conviction for Assault with Deadly Weapon or Force Likely to Produce Great Bodily Injury under CAL. PENAL CODE § 245(a)(1) constitutes a crime involving moral turpitude barring a finding of his good moral character under section 101(f)(3) of the Act.

Notwithstanding his conviction, the petitioner denied, in his statement below, all culpability for the underlying offense. On appeal, the petitioner again maintains his innocence, and states that he was unaware of the consequences of pleading no contest and only did so to be released from custody as soon as possible. Inasmuch as the petitioner avers his lack of culpability, we cannot look behind his conviction to reassess his guilt or innocence. *Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031 (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); *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996). The petitioner's assertions are also contradicted by a Waiver of Plea of Guilty/No Contest that he executed on November 4, 2002 and in which he specifically acknowledged the possible immigration consequences of his plea of no contest. The petitioner's denial of responsibility for his criminal offense is also inconsistent with a domestic violence program discharge sheet in the record, indicating that he appeared to have accepted responsibility for abusive behavior and the present offense.

The petitioner testified in his removal proceedings that he owed approximately \$24,000 in outstanding child support payments for his daughter from his first marriage. The petitioner explains on appeal that he has not had steady employment since arriving in the United States because of his immigration problems, and that he no longer has copies of the checks for payments he claims to have made ten to twelve years ago. He states that he is willing to pay the child support he owes as soon as he is able. The record includes a job offer letter from a potential employer subject to the petitioner securing valid employment authorization. As additional evidence of his good moral character, the petitioner submitted his blood donor card and a letter from the director of his Sikh temple, indicating that he is a member and regularly performs community service.

Upon review of the record in totality, the petitioner's criminal conviction and subsequent violation of probation and the restraining order issued against him, his denial of responsibility and lack of any expression of remorse for his unlawful acts, and his failure to pay child support 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, failed to demonstrate his good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Joint Residence

Beyond the decision of the director, the petitioner has also not established that he resided with his wife. The petitioner indicated on the Form I-360 that he lived with T-N- from January 2008 to June 2014, and that they last resided together at their residence on [REDACTED] California.

Traditional forms of joint documentation are not required, and a petitioner may submit "affidavits or any other type of relevant credible evidence of residency." See 8 C.F.R. § 204.2(c)(2)(iii). Here, the petitioner has not set forth, in either of his personal statements, any history or timeline of joint marital residence with T-N- or described in any detail any home they shared. In addition, the petitioner asserted in his first personal statement that he and T-N- moved together to [REDACTED] California where they resided until separating in June 2014. This statement is inconsistent with the petitioner's assertion on the Form I-360 that he and T-N- last resided together on [REDACTED] in

██████████ until June 2014. The petitioner did not submit any documentary evidence of the claimed joint residence in these proceedings. The evidence of record does not, therefore, demonstrate that the petitioner resided with his spouse, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

Entry into the Marriage in Good Faith

Also beyond the director's decision, the relevant evidence does not demonstrate that the petitioner entered into his marriage with T-N- in good faith. The petitioner submitted his marriage certificate which establishes a legal marriage and that he and T-N- had a relationship, but does not demonstrate the nature of the relationship or the petitioner's good faith marital intentions. In his statement below, the petitioner indicated that he met T-N- at her salon where he used to get his hair cut. He stated that they became friends, later started dating, and discussed their respective marital and family problems as they grew closer. Eventually, T-N- moved in with the petitioner sometime in June 2007 and after her divorce became final, they married in January 2008. The petitioner recalled that he and T-N- moved together to ██████████ where they lived until their separation in June 2014, although he indicated that he spent less and less time at home beginning in late 2011 due to the problems they had. The petitioner did not describe in any probative detail his courtship with T-N-, their wedding ceremony, joint residence or any shared experiences, apart from the claimed abuse. On appeal, the petitioner submits a supplemental statement which is similarly lacking and does not address his marital intentions.

Traditional forms of joint documentation are not required to demonstrate a petitioner's entry into the marriage in good faith. See 8 C.F.R. §§ 103.2(b)(2)(iii), 204.2(c)(2)(i). Rather, a petitioner may submit "testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. . . . and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered." See 8 C.F.R. § 204.2(c)(2)(vii). Here, the record does not contain any statements from the petitioner's family or friends, and his own statements do not provide sufficient detail to adequately demonstrate his good faith intentions in marrying T-N-. When viewed in the totality, the preponderance of the relevant evidence does not demonstrate that the petitioner entered into marriage with his wife in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

Section 204(g) of the Act further Bars Approval

Beyond the director's decision, the record indicates that the petitioner was in removal proceedings when he married T-N-. The petitioner was placed into removal proceedings on September 5, 2007 and he subsequently married T-N- on January 12, 2008. The record does not indicate that the petitioner departed the United States under an order of removal or that he resided outside of the United States for two years after his marriage. Accordingly, section 204(g) of the Act bars approval of the instant self-petition unless the petitioner establishes the bona fides of his marriage by clear and convincing evidence pursuant to section 245(e)(3) of the Act. See 8 C.F.R. §§ 204.2(a)(1)(iii), 245.1(c)(8)(ii)(A). Without establishing eligibility for the bona fide marriage exemption at section 245(e) of the Act, the petitioner cannot demonstrate eligibility for immediate relative classification.

While identical or similar evidence may be submitted to establish a good faith marriage pursuant to section 204(a)(1)(A)(iii)(I)(aa) of the Act and the bona fide marriage exception at section 245(e)(3) of

the Act, the latter provision imposes a heightened burden of proof. *Matter of Arthur*, 20 I&N Dec. 475, 478 (BIA 1992); see also *Pritchett v. I.N.S.*, 993 F.2d 80, 85 (5th Cir. 1993) (acknowledging “clear and convincing evidence” as an “exacting standard”). Demonstrating eligibility under section 204(a)(1)(A)(iii)(I)(aa) of the Act requires the petitioner to establish his good-faith entry into the qualifying relationship by a preponderance of the evidence, and any credible evidence shall be considered. Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J); *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). However, to be eligible for the *bona fide* marriage exemption under section 245(e)(3) of the Act, the petitioner must establish his good-faith entry into the marriage by clear and convincing evidence. Section 245(e)(3) of the Act, 8 U.S.C. § 1255(e)(3); 8 C.F.R. § 245.1(c)(9)(v). “Clear and convincing evidence” is a more stringent standard. *Arthur*, 20 I&N Dec. at 478. Here, as the petitioner has not established his good-faith entry into his marriage to T-N- by a preponderance of the evidence under section 204(a)(1)(A)(iii)(I)(aa) of the Act, he also has not demonstrated the bona fides of his marriage under the applicable heightened standard of proof required by section 245(e)(3) of the Act. Section 204(g) of the Act consequently bars approval of the petitioner’s self-petition.

Conclusion

On appeal, the petitioner has not overcome the director’s ground for denial, as he has not demonstrated that he is a person of good moral character. Beyond the decision of the director, the petitioner has also not established that he entered into the marriage with T-N- in good faith and resided with her. In addition, section 204(g) of the Act bars approval of the instant petition, and the petitioner, has therefore, not established his eligibility for immediate relative classification under section 201(b)(2)(A)(i) of the Act. The petitioner is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act and his petition must be denied.

The burden of proof in these proceedings rests solely with the petitioner. 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. Accordingly, the appeal will be dismissed and the petition will remain denied.

ORDER: The appeal is dismissed.