



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

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

MATTER OF K-N-P-

DATE: NOV. 23, 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 United States 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.¹ The appeal will be dismissed.

I. APPLICABLE LAW

Section 204(a)(1)(A)(iii)(I) of the Act provides that a petitioner who is the spouse of a United States citizen may self-petition for immigrant classification if the petitioner demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the petitioner or a child of the petitioner was battered or subjected to extreme cruelty perpetrated by the petitioner's spouse. In addition, the petitioner 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].

¹ The Petitioner is considered to be self-represented. Although the brief on appeal appears to have been prepared by a non-attorney representative, the Petitioner signed and filed the Form I-290B, Notice of Appeal or Motion, and no properly executed Form G-28, Notice of Appearance as Attorney or Representative, was submitted on appeal as required by form instructions and under 8 C.F.R. § 292.4(a) ("The appearance will be recognized by the specific immigration component of [United States Department of Homeland Security (DHS)] in which it was filed until the conclusion of the matter for which it was entered. This does not change the requirement that a new form must be filed with an appeal filed with the Administrative Appeals Office...").

The eligibility requirements are further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

(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 citizen . . . spouse, must have been perpetrated against the self-petitioner or the self-petitioner’s child, 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)] and subparagraph (C) thereof of such section (except as such paragraph relates to simple possession of thirty grams or less of marijuana), 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)(i)(II) of the Act, includes, “any alien convicted of. . . a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance. . . .”

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.

* * *

(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.

* * *

(b)(6)

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II. FACTS AND PROCEDURAL HISTORY

The Petitioner is a citizen of Trinidad who entered the United States on September 1, 1984, as a B-2 nonimmigrant visitor. The Petitioner married his U.S. citizen wife, C-N-C-,² on [REDACTED] 2009, in New Jersey. The Petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on March 17, 2014. The Director subsequently issued requests for evidence (RFE) of, among other things, C-N-C-'s battery or extreme cruelty, the Petitioner's entry into the marriage in good faith, and the Petitioner's good moral character. The Director found the Petitioner's responses to the RFEs insufficient and denied the petition because the Petitioner did not establish the requisite battery or extreme cruelty and good moral character. On appeal, the Petitioner submits a brief in which he asserts that he submitted sufficient evidence to show his eligibility and additional evidence.

III. ANALYSIS

We review these proceedings *de novo*. On appeal, the Petitioner has not established that he was subjected to battery or extreme cruelty by C-N-C- during their marriage and that he has the requisite good moral character. The claims and evidence submitted on appeal do not overcome the Director's grounds for denial.

A. Battery or Extreme Cruelty

In his affidavit, the Petitioner generally stated that he called the police after C-N-C- broke his property and became physically aggressive and verbally insulting. He indicated that C-N-C- knocked him down, tried to grab his phone, and threatened to have him deported. In his affidavit on appeal, the Petitioner states generally that C-N-C-'s verbal abuse was ongoing and then became physical. He adds that on one occasion, C-N-C- came to his apartment to pick up her mail and she screamed at him. The Petitioner's general claims that C-N-C- knocked him down and physically and verbally abused him lack substantive, detailed information sufficient to demonstrate that C-N-C- battered him. The other acts the Petitioner describes are not comparable to those described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi) as extreme cruelty.

The Petitioner also submitted a statement from [REDACTED] who indicated that she heard shouting and was later told it was C-N-C-. The Petitioner's niece, [REDACTED] recalled that C-N-C- once told her she would beat the Petitioner but that C-N-C- never showed up at their apartment. The Petitioner's brother, [REDACTED] stated generally that he "heard her verbally abusing, shoving, and throwing objects at him," and that C-N-C- was verbally abusive. [REDACTED] indicated that she visited the Petitioner and C-N-C- sometimes and that C-N-C- often seemed angry. [REDACTED] and [REDACTED] stated generally that C-N-C- was physically and verbally abusive.

The Petitioner submitted a letter from [REDACTED], an intern at the [REDACTED] New Jersey, stating that the Petitioner has been receiving counseling for being a victim of domestic

² Name withheld to protect the individual's identity.

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violence. The Petitioner also submitted a copy of a temporary restraining order (TPO) he obtained against C-N-C- in which he alleged that she called him names, hit him with her purse, broke his laptop, and threw him on the couch several times.

None of the letters provided any probative and detailed descriptions of any particular incident of battery or extreme cruelty. Similarly, the letter from [REDACTED] does not offer any new facts or probative descriptions of any particular incidents of battery or acts comparable to those described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). Furthermore, although asked in the RFE to submit the final order of the hearing related to the TPO, the Petitioner did not provide the order or otherwise address the outcome of the hearing in his affidavits.

On appeal, the Petitioner asserts that he has submitted sufficient evidence to establish his eligibility. He submits another affidavit from [REDACTED] who states generally that C-N-C- called the Petitioner names and threatened him. Again, [REDACTED] does not offer any probative and detailed descriptions of any particular incidents of battery or acts comparable to those described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi). The relevant evidence does not show that C-N-C-'s behavior involved battery or psychological or sexual abuse, or otherwise constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi). The Petitioner also did not describe any behavior or establish that any other acts were part of an overall pattern of violence. *Id.* Accordingly, the Petitioner has not established by a preponderance of the evidence that C-N-C- subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

B. Good Moral Character

The record reflects that on or about [REDACTED], 2004, the Petitioner was arrested and charged with possession of more than 50 grams of marijuana and manufacture, distribution or dispensing of a controlled dangerous substance within a school zone and in proximity to public housing facilities in violation of New Jersey Statutes annotated (N.J. Stat. Ann.) §§ 2C:35-2, 3, 5, 7, 7.1, and 10.³ The Petitioner pled guilty to these charges. Prosecution of the Petitioner's case was deferred pursuant to his guilty plea under the New Jersey Pre Trial Intervention Program and ultimately dismissed upon his completion of all the requirements imposed by the court. *See* N.J. Ct. R. 3:28. The disposition of the Petitioner's criminal offense constitutes a conviction under the Act.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

³ Case number [REDACTED]

- (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.

Here, the Petitioner entered a plea of guilty to the charges, and the Pre Trial Intervention Program includes as standard conditions that the defendant pay assessments for fees, penalties and fines. See New Jersey Courts, Pre Trial Intervention Programs, available at <https://www.judiciary.state.nj.us/criminal/crpti.htm> (accessed September 10, 2015, and added to the record of proceeding).⁴ The Board of Immigration Appeals has held that the imposition of costs and surcharges in a criminal sentence constitutes a form of penalty or punishment under section 101(a)(48)(A). *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008). As such, both prongs of the definition of a conviction have been satisfied.

Section 101(f)(3) of the Act bars a finding of good moral character for any alien described in section 212(a)(2)(A)(i)(II) of the Act, for having been convicted of a controlled substance offense. The Petitioner was convicted of possession of more than 50 grams of marijuana (a controlled substance) and manufacture, distribution or dispensing of a controlled substance within a school zone and in proximity to public housing facilities. Consequently, section 101(f)(3) of the Act prohibits a determination that he is a person of good moral character.⁵

On appeal, the Petitioner asserts that his conviction was vacated and that he has submitted all the requested records in connection with his conviction. He also submits various affidavits attesting to his good moral character. However, a conviction vacated due to procedural or substantive defects in the criminal proceedings will not be considered for immigration purposes, but a conviction vacated for rehabilitative or immigration reasons remains valid in immigration proceedings. See *Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006) (affirming this interpretation of conviction at section 101(a)(48)(A) of the Act, as stated by the Board of Immigration Appeals in *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), while vacating that decision on other grounds). The Petitioner has not shown that his conviction was vacated based on a procedural or substantive defect in the underlying proceedings, as it was vacated under a rehabilitative pretrial intervention program. For the reasons stated above, the Petitioner's conviction is still a conviction under the Act, and we cannot look behind his conviction to reassess his guilt or innocence. See *Matter of Roldan*, 22 I&N Dec.

⁴ Although the Petitioner was requested to provide the records of conviction for his crimes, he provided only the record of vacateur and the record of expungement, not the record of the underlying conviction. The Petitioner bears the burden of proof to show his good moral character and that he does not have any disqualifying convictions. See § 204(a)(1)(A)(iii)(II)(bb) of the Act.

⁵ As we are finding that the Petitioner's conviction bars a finding of his good moral character pursuant to section 101(f)(3) of the Act as a conviction relating to a controlled substance, we do not further address whether he also lacks good moral character under section 212(a)(2)(A)(i)(I) of the Act as an alien convicted of a crime involving moral turpitude, and whether his conviction falls within section 212(a)(2)(C)(i) of the Act as a drug trafficking offense. Similarly, we need not make an additional determination as to whether the Petitioner has been convicted of an aggravated felony and is therefore also barred under section 101(f)(8) of the Act.

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512 (BIA 1999); *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); *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1974) (same).

A self-petitioner may only be found to have good moral character despite an act or conviction that would otherwise bar such a finding under section 101(f) of the Act if: 1) the alien's act or conviction is waivable for the purposes of determining admissibility or deportability under section 212(a) or section 237(a) of the Act; and 2) U.S. Citizenship and Immigration Services (USCIS) determines that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty. Section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C). The Petitioner's crime is not waivable under section 212(h) of the Act, as it involved possession, manufacture, or distribution of more than 50 grams of marijuana in a prohibited area, and the Petitioner has not provided any evidence that the conviction was connected to him having been battered or subjected to extreme cruelty. As such, the Petitioner has not established his good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

IV. CONCLUSION

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); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of K-N-P-*, ID# 14480 (AAO Nov. 23, 2015)