



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

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

MATTER OF J-N-D-

DATE: OCT. 24, 2016

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) section 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii). Under the Violence Against Women Act (VAWA), an abused spouse may self-petition as an immediate relative rather than remain with or rely upon an abuser to secure immigration benefits.

The Director, Vermont Service Center, denied the Petitioner's Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (VAWA petition), concluding that the Petitioner did not establish that he is a person of good moral character.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief. The Petitioner claims that he is a person of good moral character.

Upon *de novo* review, we will dismiss the appeal.

**I. 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.

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

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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 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 VAWA 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:

(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.

The burden of proof is on a petitioner to demonstrate eligibility by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). A petitioner may submit any evidence for us to consider; however, we determine, in our sole discretion, the credibility of and the weight to give that evidence. *See* section 204(a)(1)(J) of the Act; 8 C.F.R. § 204.2(c)(2)(i).

## II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

The Petitioner, a citizen of Mexico, married F-P-,<sup>1</sup> on [REDACTED] 2002, in California and filed the instant VAWA petition based on his marriage to F-P-. The Director issued a Request for Evidence (RFE) of the Petitioner's good moral character because a review of the Petitioner's criminal history indicated that, on [REDACTED] 1989, he was arrested and charged with vehicular manslaughter under section 192(c)(1) of the California Penal Code and, in 1995, he was convicted of misdemeanor injury to spouse or cohabitant under section 273.5(a) of the California Penal Code. The Director subsequently denied

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<sup>1</sup> We provide the initials of individual names throughout this decision to protect identities.

the VAWA petition, determining that the Petitioner was not a person of good moral character, and the Petitioner timely appeal. We have reviewed all of the evidence in the record of proceedings.

### III. ANALYSIS

#### A. The Petitioner Has Not Met His Burden of Proof Regarding His Arrest Under Section 192(c)(1) of the California Penal Code

The Director correctly determined that the Petitioner's conviction under section 273.5(a) of the California Penal Code is a crime involving moral turpitude, and the Petitioner does not dispute this determination on appeal. The term "crime involving moral turpitude" is not defined in the Act. In interpreting the phrase, the Board of Immigration Appeals (Board) held, in *Matter of Sejas*, 24 I&N Dec. 236, 237 (BIA 2007), that "moral turpitude" generally refers to conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." Therefore, a crime involving moral turpitude requires two essential elements: reprehensible conduct and a culpable mental state. *Matter of Silva-Trevino*, 21 I&N Dec. 826, 834 (BIA 2016) (*Silva-Trevino III*) (citing *Nino v. Holder*, 690 F.3d 691, 695 (5th Cir. 2012)).

The Director also noted that, if the Petitioner was also convicted under section 192(c)(1) of the California Penal Code, then he would not be eligible for the petty offense exception under section 212(a)(2)(A)(i)(I) of the Act.<sup>2</sup> The Petitioner, however, contends on appeal that he provided sufficient evidence that he was not convicted under section 192(c)(1) of the California Penal Code.

As a preliminary matter, we affirm that the Petitioner's conviction under section 273.5(a) of the California Penal Code, as a single conviction, is subject to the petty offense exception under section 212(a)(2)(A)(i)(I) of the Act. As noted by the Director, section 273.5(a) of the California Penal Code provided, at the time of the Petitioner's conviction, that:

(a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person with whom he is cohabitating, 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.

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<sup>2</sup> The Director referred to vehicle manslaughter as an offense under section 193(c)(1) of the California Penal Code. In fact, the Petitioner was arrested and charged with vehicular manslaughter under section 192(c)(1); section 193(c)(1) refers to the sentence which may be imposed for a violation of section 192(c)(1). The Petitioner included a copy of section 192(c)(1) of the California Penal Code with his brief on appeal and, accordingly, the Petitioner is aware of this distinction. We withdraw the Director's reference to section 193(c)(1) and will refer only to the Petitioner's arrest and charge under section 192(c)(1).

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In turn, the petty offense exception contained in section 212(a)(2)(A) of the Act provides in relevant part:

(i) In General. -- Except as provided in clause (ii), any alien convicted of . . .

(I) a crime involving moral turpitude . . . 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 . . . did not exceed imprisonment for one year and . . . 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).

Here, the record of proceedings reflects that the Petitioner was convicted of a misdemeanor under section 273.5(a) of the California Penal Code. Section 17(b)(4) of the California Penal Code allows prosecutors to charge certain offenses, including violations of section 273.5(a) of the California Penal Code, at a misdemeanor level. *See Matter of Tran*, 21 I&N Dec. 291 (BIA 1996); *see also Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003). As a misdemeanor, a conviction under section 273.5(a) of the California Penal Code is subject to imprisonment in a county jail for not more than one year and the Petitioner was sentenced to 24 months of probation and 30 days in jail. Accordingly, the Petitioner's conviction under section 273.5(a) of the California Penal Code is subject to the petty offense exception under section 212(a)(2)(A)(i)(I) of the Act.

However, if the Petitioner was convicted under section 192(c)(1) of the California Penal Code, he is ineligible for the petty offense exception under section 212(a)(2)(A)(ii) of the Act, the application of which is limited to a single crime involving moral turpitude. The Petitioner has not met his burden of demonstrating the non-existence of records relating to the vehicular manslaughter charge lodged against him under section 192(c)(1) of the California Penal Code.

In response to the RFE, the Petitioner provided a declaration from the California Highway Patrol (CHP), a certificate regarding name search results from the Superior Court of California for the [REDACTED] a handwritten note from a clerk at the [REDACTED] and a personal statement pertaining to this incident. In the personal statement he submitted in response to the RFE, the Petitioner recalls the following:

On [REDACTED] 1984,<sup>3</sup> I was driving back from the beach on a pick-up truck and I had a few friends riding on the back of the truck. We were involved in a car accident and one of my friends died at the scene. The Highway Patrol arrived and arrested me and took me

<sup>3</sup> This personal statement was originally written in Spanish and translated into English; on the original personal statement, the year listed is "1989" and we attribute the incorrect date on the translated version to an error on the part of the translator.

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and later transferred me to the [REDACTED] where I was arrested for two days. I was later released. I was never given a court date or had to present myself in front of a judge.

In the brief on appeal, the Petitioner's counsel indicates that a clerk at the [REDACTED] gave the Petitioner the note he submitted in response to the RFE and referred him to the CHP and provided him with a case number. However, when claiming that a record is not available a petitioner must follow the regulation at 8 C.F.R. § 103.2(b)(2), which the Petitioner has not done here. In addition, there is no indication in the record that the Petitioner attempted to locate a record with that case number at the CHP, as the declaration from the CHP does not reflect that a search was conducted using that case number, nor does it indicate what information was provided to the CHP in order to perform a search of their records. The CHP declaration provides that "[i]t is understood that such records may exist under another spelling, name, classification, but with the information provided to our office and to the best of my knowledge, no such records exist at this facility." Accordingly, the Petitioner has not met his burden of establishing the non-existence or unavailability of records relating to the 198 arrest.

The certificate from the Superior Court of California for the [REDACTED] indicates that a search was performed under the name of the Petitioner, as he lists his name on the VAWA petition, and a case under that name was not located. Other evidence in the record of proceedings, including documents issued by the Superior Court of California for the [REDACTED] in 1995 and 2013, reflect that the Petitioner's two surnames are inverted. In addition, on previous submissions to U.S. Citizenship and Immigration Services, including a Form I-485, Application to Register Permanent Residence or Adjust Status, filed on May 5, 2005, the Petitioner only used one surname. Accordingly, it is unclear whether a search under the name used by the Petitioner on his VAWA petition would yield records related to his arrest and possible prosecution in 1989, and the Petitioner does not indicate what name he used when he was arrested in 1989.

In summary, the Petitioner has not established the non-existence or unavailability of records relating to his arrest for violating section 192(c)(1) of the California Penal Code because he has not provided evidence of records checks under all variations of his name that he has used throughout the years. Although we cannot determine whether the Petitioner was convicted under section 192(c)(1) of the California Penal Code, he is nevertheless not a person of good moral character under section 101(f) of the Act for the following reasons.

#### B. Good Moral Character under the "Catch All" Provision of Section 101(f) of the Act

The record does not establish the Petitioner's 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).

In the context of making discretionary determinations, the Board noted in *Silva-Trevino III* that, "[i]n cases involving criminal acts, the Immigration Judge is not limited by any type of categorical assessment and may examine the actual nature of the crime by considering evidence outside of the record of conviction." *Silva Trevino III*, at 837 (citing *Matter of Teixeira*, 21 I&N Dec. 316, 321

(BIA 1996) and *Matter of Thomas*, 21 I&N Dec. 20, 23 (BIA 1995)). Accordingly, in making a discretionary determination regarding the Petitioner's good moral character, we may also examine the nature of the crime committed by the Petitioner when he violated section 273.5(a) of the California Penal Code.

In response to the RFE, the Petitioner submitted documents pertaining to his arrest and conviction under section 273.5(a) of the California Penal Code, which confirm that he pled *nolo contendere* to the offense described in section 273.5(a) of the California Penal Code, and he was sentenced to 24 months of probation and 30 days in jail. 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." As noted above, the regulation at 8 C.F.R. § 204.2(c)(1)(vii) 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 under section 273.5(a) of the California Penal Code of the offense of "inflicting corporal injury resulting in a traumatic condition" upon his former spouse. The Incident Report pertaining to his conviction under section 273.5(a) of the California Penal Code indicates that his former spouse and another witness told the arresting officer that the Petitioner pushed his former spouse to the ground and dragged her into their house by her hair, and the arresting officer noted injuries to his former spouse's elbow and knee.

The record of proceedings indicates that, six months after he was convicted of that offense, the prosecutor filed a petition to initiate proceedings to revoke probation, and the Petitioner was then ordered to attend and complete a 52-week program of anger management classes. There is no evidence in the record of proceedings that the Petitioner completed this program and, accordingly, the Petitioner has not established that he complied with that condition of his sentence.

In his personal statement regarding his conviction under section 273.5(a) of the California Penal Code, the Petitioner indicates that he was arrested but he does not admit that he pled *nolo contendere* to the charge. He also recalls that the judge ordered him to attend domestic violence classes for six months when, in fact, he was ordered to attend anger management classes for nearly one year. He writes that he holds himself responsible for "[w]hat happened 19 years ago" but he does not identify what happened and his role in the incident. In addition, in the personal statement he submitted with the VAWA petition, the Petitioner denies that he ever touched his former spouse; however, we cannot 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

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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).

Based on our evaluation of the foregoing evidence, the Petitioner has not established that he accepts culpability for the charge of which he was convicted under section 273.5(a) of the California Penal Code. Accordingly, inasmuch as the Petitioner relies on his claimed innocence of the underlying acts leading to his conviction, he has not satisfied his burden to establish extenuating circumstances for his conviction.

Upon review of the record of proceedings in totality, the Petitioner's conviction under section 273.5(a) of the California Penal Code, the lack of extenuating circumstances for his unlawful actions that led to this conviction and his lack of accountability for those actions, as well as the Petitioner's failure to meet his burden to demonstrate the non-existence of records relating to the vehicular manslaughter charge lodged against him under section 192(c)(1) of the California Penal Code, 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

As the Petitioner is not a person of good moral character he is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

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 J-N-D-*, ID# 8385 (AAO Oct. 24, 2016)