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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

B9

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 13 2007
EAC 04 125 51188

IN RE: Petitioner: [redacted]

PETITION: Petition for Immigrant Battered 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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Deadnick
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition because the petitioner did not establish that she was a person of good moral character.

On appeal, counsel submits a brief and additional evidence.

Section 204(a)(1)(A)(iii) 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 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. 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.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are contained 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.
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> * * *
>
> (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 record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of the Dominican Republic who was paroled into the United States on April 28, 2001 pursuant to section 212(d)(5) of the Act. On May 3, 1996, the petitioner married P-J-[1], a U.S. citizen, in New York. The petitioner filed this Form I-360 on March 15, 2004. The director subsequently issued a Request for Evidence (RFE) of, *inter alia*, the petitioner's good moral character. In response,

[1] Name withheld to protect individual's identity.

the petitioner submitted evidence that she had been convicted of a controlled substance offense. On September 19, 2005, the director denied the petition for lack of good moral character. The petitioner, through counsel, timely appealed.

On appeal, counsel concedes that the petitioner was convicted of a controlled substance offense, but requests that the petitioner be granted a "waiver of excludability" based on the extreme hardship her daughters would face if the petitioner were removed from the United States. Due to her conviction, the petitioner is not eligible for a waiver of removability and we concur with the director's conclusion. Nonetheless, the petition will be remanded because the director denied the case without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

Good Moral Character

The petitioner submitted the results of a search of her fingerprints conducted by the City of New York Police Department, which states that she was convicted of criminal possession of a narcotic drug in violation of section 220 of the New York Penal Code. On appeal, the petitioner submits a copy of the "Miscellaneous Certificate No. 3848" of the Supreme Court of New York, New York County, which states that on June 11, 1999, the petitioner pled guilty to "Attempted Criminal Possession of a Controlled Substance 3°" and sentenced to five years of probation on August 5, 1999. The record also contains a certified copy of the Certificate of Disposition from the New York Supreme Court, New York County, which states that on June 11, 1999, the petitioner was convicted upon plea of attempted criminal possession of a controlled substance in the third degree in violation of section 220.16 of the New York Penal Code. The Certificate states that on August 5, 1999, the court sentenced the petitioner to five years of probation and suspended her license for six months.

Section 220.16 of the New York Penal Code states:

> Criminal possession of a controlled substance in the third degree
>
> A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses:
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> 1. a narcotic drug with intent to sell it; or
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> 2. a stimulant, hallucinogen, hallucinogenic substance, or lysergic acid diethylamide, with intent to sell it and has previously been convicted of an offense defined in article two hundred twenty or the attempt or conspiracy to commit any such offense; or
>
> 3. a stimulant with intent to sell it and said stimulant weighs one gram or more; or
>
> 4. lysergic acid diethylamide with intent to sell it and said lysergic acid diethylamide weighs one milligram or more; or

5. a hallucinogen with intent to sell it and said hallucinogen weighs twenty-five milligrams or more; or

6. a hallucinogenic substance with intent to sell it and said hallucinogenic substance weighs one gram or more; or

7. one or more preparations, compounds, mixtures or substances containing methamphetamine, its salts, isomers or salts of isomers with intent to sell it and said preparations, compounds, mixtures or substances are of an aggregate weight of one-eighth ounce or more; or

8. a stimulant and said stimulant weighs five grams or more; or

9. lysergic acid diethylamide and said lysergic acid diethylamide weighs five milligrams or more; or

10. a hallucinogen and said hallucinogen weighs one hundred twenty-five milligrams or more; or

11. a hallucinogenic substance and said hallucinogenic substance weighs five grams or more; or

12. one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of one-half ounce or more; or

13. phencyclidine and said phencyclidine weighs one thousand two hundred fifty milligrams or more.

Criminal possession of a controlled substance in the third degree is a class B felony. N.Y. Penal Law § 220.16 (McKinney 2007).

Section 110.00 of the New York Penal Law defines an attempt offense as follows:

> A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

N.Y. Penal Law § 110.00 (McKinney 2007).

The record does not indicate the particular subsection of section 220.16 of which the petitioner was convicted of attempting. However, the record clearly shows that the petitioner was convicted of an attempt to commit criminal possession of a controlled substance.

Section 101(f) of the Act states, in pertinent part:

> For the purposes of this Act – 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) and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of thirty grams or less of marihuana) . . . .

Section 212(a)(2)(A)(i)(II) of the Act describes any alien convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance[.]"

Contrary to counsel's assertion, the Act provides no waiver or exception for the petitioner's offense. *See* Section 212(h) of the Act, 8 U.S.C. § 1182(h) (only waivable controlled substance crime is a single offense of simple possession of 30 grams or less of marijuana); Section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i) (exception to deportability for controlled substance offenses only applies to a single offense involving possession for one's own use of thirty grams or less of marijuana).

As the petitioner's conviction is not waivable, she is also ineligible for a discretionary determination of good moral character. Section 204(a)(1)(C) of the Act provides Citizenship and Immigration Services (CIS) with the discretion to find a petitioner to be a person of good moral character despite his or her criminal record if: 1) the petitioner's conviction is waivable for the purposes of determining admissibility or deportability under section 212(a) or section 237(a) of the Act; and 2) the conviction was connected to the alien's battery or subjection to extreme cruelty by his or her U.S. citizen or lawful permanent resident spouse or parent. Section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C).

In her October 14, 2005 letter submitted on appeal, the petitioner states that at the time of her arrest, she had fled her husband's abuse while she was pregnant and was temporarily staying with a distant cousin. The petitioner explains that she was unaware that her cousin was selling drugs until she was arrested as his accomplice. Even if the petitioner's conviction was connected to her husband's abuse or extreme cruelty, the statute does not allow a discretionary determination of her good moral character because the petitioner's conviction is not waivable for the purposes of determining admissibility or deportability.

On appeal, counsel further claims that "one arrest over five years ago should not be a basis to deny the I-360 petition." Counsel is mistaken. The statute does not state a time period during which the self-

petitioner must demonstrate his or her good moral character. *See* Section 204(a)(1)(A)(iii)(II)(bb) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb). The regulation at 8 C.F.R. § 204.2(c)(2)(v) requires a police clearance, criminal background check or similar report from the appropriate authority of each locality where the self-petitioner resided for six or more months during the three-year period immediately preceding the filing of the self-petition. Yet the regulation's designation of the three-year period preceding the filing of the petition does not limit the temporal scope of CIS's inquiry into the petitioner's good moral character. The agency may investigate the self-petitioner's character beyond the three-year period when there is reason to believe that the self-petitioner lacked good moral character during that time. *See* Preamble to Interim Regulations, 61 Fed. Reg. 13061, 13066 (Mar. 26, 1996).

Finally, we note that in her October 14, 2005 letter, the petitioner states that she did not commit the crime of which she was convicted. The petitioner explains that she only pled guilty because her criminal defense attorney told her that doing so would allow her to get out of jail quickly and return to her infant daughter. We lack the authority to look behind the petitioner's conviction and reassess her guilt or innocence. *In Re. Calvo*, 21 I&N Dec. 323, 327 (BIA 1996).

The petitioner was convicted of a controlled substance offense, for which the Act provides no waiver or exception to inadmissibility or deportability. Accordingly, section 101(f) bars a finding of the petitioner's good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act based on the present record.

Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that CIS must provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiency of her case.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.