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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B9

Date: AUG 22 2011 Office: [redacted] File: [redacted]

IN RE: Petitioner: [redacted]

PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(B)(ii)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, [redacted] denied the immigrant visa petition. On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed and the petition will remain denied.

The petitioner seeks immigrant classification pursuant to section 204(a)(1)(B)(ii) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by a lawful permanent resident of the United States.

The director denied the petition because the petitioner failed to establish that he was a person of good moral character due to his conviction for selling a controlled substance. In our April 3, 2009 decision on appeal, we affirmed the director's determination that the petitioner lacked good moral character, but remanded the matter to the director for issuance of a Notice of Intent to Deny (NOID) in compliance with the former regulation at 8 C.F.R. § 204.2(c)(3)(ii) (2007). Upon remand, the director issued a NOID to which counsel responded with a brief. On February 3, 2011, the director reaffirmed his determination that the petitioner lacked good moral character due to his conviction and certified his decision to the AAO for review. On certification, counsel submits an additional brief and evidence.

Counsel's submission on certification fails to overcome the ground for denial and the February 3, 2011 decision of the director will be affirmed for the following reasons.

Applicable Law

Section 204(a)(1)(B)(ii) of the Act provides, in pertinent part, that an alien who is the spouse of a lawful permanent resident of the United States may self-petition for preference immigrant classification if the alien demonstrates that he or she entered into the marriage with the lawful permanent resident spouse in good faith and that during the marriage, the alien or a child of the alien was battered by or was the subject of extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as a preference immigrant under section 203(a)(2)(A) of the Act, resided with the spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II), 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J), states, in pertinent part:

> In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), 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 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 a single offense of simple possession of thirty grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;
>
> * * *
>
> (8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)) . . . .
>
> * * *
>
> 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) of the Act, includes, in pertinent part:

> (A) Conviction of Certain Crimes

(i) In General . . .

any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

* * *

(II) 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 (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . . .

* * *

(C) Controlled Substance Traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe –

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so [.]

As referenced in section 101(f)(8) of the Act, section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), defines an aggravated felony as, in pertinent part:

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)[.]

The evidentiary guidelines for a self-petition under section 204(a)(1)(B)(ii) 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. . . . 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 native and citizen of [redacted] who states on the Form I-360 that he entered the United States on July 1, 1989. On September 22, 2001, the petitioner married a U.S. lawful permanent resident, in [redacted] The petitioner filed this Form I-360 on February 26, 2007.

The petitioner submitted records which show that in 1996 he pled guilty to and was convicted of violating section 11352(A) of the California Health and Safety Code, which states:

> Transportation, sale, giving away, etc., of designated controlled substances; punishment
>
> (a) Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054 . . . or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for three, four, or five years.

Cal. Health and Safety Code Ann. § 11352 (West 1996). California classifies this offense as a felony. Cal. Penal Code Ann. § 17(a) (West 1996).

The San Francisco County, Superior Court of California convicted the petitioner of this offense pursuant to his certified guilty plea and sentenced the petitioner to three years of probation, six months of imprisonment, restitution and fines.[1]

The certified complaint, to which the petitioner pled guilty, states, in pertinent part:

> the said defendant, [the petitioner], violated section 11352 of the California Health and Safety Code as heretofore alleged *by selling and offering to sell cocaine base*, within the meaning of Penal Code Section 1203.073(b)(7) (emphasis added).

The referenced section of the California Penal Code places limits on probation and sentencing for felony convictions for controlled substances involving, *inter alia*, the sale or offer to sell cocaine base.

[1] Superior Court of California, [redacted] County, Number 147475 (April 10, 1996).

Cal. Penal Code Ann. § 1203.073(b)(7) (West 1996). That section, as well as the statute of conviction, both reference section 11054(f) of the California Health and Safety Code, which designates cocaine base as a Schedule I controlled substance. Cal. Health and Safety Code Ann. § 11054(f)(1) (West 1996).

Violation of a Controlled Substance Law and Controlled Substance Trafficker

In our prior decision, we explained that the petitioner's conviction bars a finding of his good moral character pursuant to two provisions of section 101(f)(3) of the Act. First, the petitioner was convicted of a violation of a state law relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)). Section 11352(a) of the California Health and Safety Code prohibits the sale of designated controlled substances, including cocaine base, which is a Schedule II drug under the Controlled Substances Act. 21 U.S.C. § 812(c)(a)(4). Accordingly, the petitioner is an alien described at section 212(a)(2)(A)(i)(II) of the Act and section 101(f)(3) of the Act consequently bars a determination of his good moral character.

Second, the petitioner pled guilty to selling cocaine base and based on his conviction record, U.S. Citizenship and Immigration Services (USCIS) knows that he was an illicit trafficker in a controlled substance, as described at section 212(a)(2)(C)(i) of the Act. That classification further bars a finding of his good moral character pursuant to section 101(f)(3) of the Act.

Aggravated Felony of Illicit Trafficking in a Controlled Substance

The petitioner's conviction is also an aggravated felony, which bars a determination of his good moral character under section 101(f)(8) of the Act. To determine whether a state drug offense constitutes an illicit trafficking aggravated felony, the Ninth Circuit Court of Appeals, within whose jurisdiction this case arose, has held that we must first engage in a categorical inquiry. *Rendon v. Mukasey*, 520 F.3d 967, 974 (9th Cir. 2008). A state drug offense is categorically an aggravated felony when the state statute only criminalizes conduct that satisfies the definition of an aggravated felony. *Id.* When the state statute is divisible and encompasses conduct which both would and would not be an aggravated felony, then we must engage in a modified categorical approach to determine if the specific conduct of which the alien was actually convicted constitutes an aggravated felony. *Id.* Under the modified categorical approach, we may consider the state charging document, the guilty plea and the judgment. *Id.* at 975.

A state drug offense will constitute an aggravated felony under section 101(a)(43)(B) of the Act "if it contains a trafficking element." *Id.* at 974. In this case, the statute of conviction, section 11352(a) of the California Health and Safety Code, is divisible because it includes the mere offer to sell, transport, import, furnish, administer or give away a controlled substance. *United States v. Crawford*, 520 F.3d 1072, 1078 (9th Cir. 2008). The Ninth Circuit has held that such solicitation offenses cannot be categorical aggravated felonies. *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999). Accordingly, we must engage in a modified categorical analysis and examine the petitioner's record of conviction.

The complaint charged the petitioner with violating section 11352 of the California Health and Safety Code by "selling and offering to sell cocaine base." The petitioner pled guilty to the offense as charged in the complaint. The petitioner's offense involved the sale of cocaine base, a trafficking element, and his crime consequently constitutes illicit trafficking in a controlled substance, an aggravated felony as defined at section 101(a)(43)(B) of the Act. Accordingly, section 101(f)(8) of the Act further bars a finding of the petitioner's good moral character.

On certification, counsel claims that the criminal complaint cannot be used to determine that the petitioner was convicted of a drug trafficking crime. Counsel asserts that the complaint "standing alone, is not admissible," but cites no authority for his claim. As previously stated, we may rely on the charging document as part of the record of conviction when engaging in the modified categorical approach to determine whether or not the petitioner was convicted of an illicit trafficking aggravated felony. *Rendon v. Mukasey*, 520 F.3d at 975 (quoting *Hernandez-Martinez v. Ashcroft,* 343 F.3d 1075, 1076 (9th Cir.2003) and citing 8 U.S.C. § 1229a(c)(3)(B)). *See also Mielewczyk v. Holder* 575 F.3d 992, 995 (9th Cir. 2009) (including the charging document as part of the record of conviction which may be relied upon to determine whether a conviction violated a law relating to a controlled substance under section 237(a)(2)(B) of the Act). The conviction record submitted by counsel explicitly states that the petitioner pled guilty to count one of the complaint, specifically charging him with the sale and offer to sell cocaine base. Counsel is also mistaken in claiming that the conviction record "merely recites" the statute of conviction and does not reference the complaint. The conviction record clearly identifies the charging document by its Municipal Court number 1291866 which is the same number listed on the criminal complaint.

Because the record of conviction clearly shows that the petitioner was convicted of a trafficking offense, there is no merit to counsel's remaining claim that the petitioner's conviction was for mere possession of a controlled substance and, as a first-time offense, would not render him ineligible because his conviction has been expunged. Counsel's reliance on *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) and the Federal First Offender Act is misplaced, as neither authority is relevant to the petitioner's case. The record of conviction shows that the petitioner's offense involved trafficking in a controlled substance, not mere possession.

Unlawful Acts that Adversely Reflect Upon the Petitioner's Moral Character

On certification, counsel does not address our prior determination and that of the director that even if the petitioner's conviction did not fall within any of the enumerated provisions of section 101(f) of the Act, the record still shows that he lacks good moral character. Section 101(f) of the Act states, in pertinent part, "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." 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 . . . 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.

In his declaration, the petitioner did not acknowledge his criminal conviction or indicate that any extenuating circumstances existed at the time he committed his offense in 1991. In addition, the record contained little evidence of rehabilitation. While the petitioner submitted recommendation letters from four individuals, none of the authors acknowledged the petitioner's criminal offense or discussed his subsequent rehabilitation in any probative detail. To the contrary, the petitioner's mother asserted that he "never did anything against the law."

The record shows that the petitioner was convicted of selling and offering to sell cocaine base. In the proceedings below, the petitioner submitted no evidence that he successfully completed probation and complied with all of the other court orders in his criminal sentence. While three individuals briefly attested to his subsequent good deeds, the record lacked any other evidence of the petitioner's rehabilitation.

On certification, the petitioner submits an August 25, 2010 Order for Dismissal by the Superior Court of California, San Francisco County vacating his conviction under section 1203.4 of the California Penal Code, a rehabilitative statute, which states, in pertinent part:

> (a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty . . . and enter a plea of not guilty . . . and . . . the court shall thereupon dismiss the accusations or information against the defendant . . . .

Cal. Penal Code Ann. § 1203.4(a) (West 2010).

The dismissal order shows that the petitioner either completed or was discharged from probation; or the court otherwise exercised its discretion in the interests of justice to dismiss the criminal charge against the petitioner. However, the dismissal order was issued three and a half years after this petition was filed and was granted under a state rehabilitative statute, which does not ameliorate the immigration consequences of his conviction. *Matter of Marroquin*, 23 I&N Dec. 705 (AG 2005) (offense expunged under section 1203.4 of the California Penal Code remains a conviction for immigration purposes).

Accordingly, the petitioner was convicted of unlawful acts which adversely reflect upon his moral

character, and prevent a finding of his good moral character pursuant to section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii).

Conclusion

The petitioner was convicted of selling and offering to sell cocaine base, a violation of a state controlled substances law and an illicit trafficking aggravated felony, from which USCIS knows that the petitioner was an illicit trafficker in a controlled substance. We are consequently barred from finding the petitioner to be a person of good moral character, as required by section 204(a)(1)(B)(ii)(II)(bb) of the Act, pursuant to section 101(f) of the Act. The petitioner is ineligible for immigrant classification under section 204(a)(1)(B)(ii) of the Act.

The burden of proof in visa petition proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met his burden and the decision of the director denying the petition shall be affirmed.

ORDER: The February 3, 2011 decision of the [redacted] is affirmed. The petition remains denied.