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

PUBLIC COPY

U.S. Citizenship and Immigration Services

B9

[redacted]

Date: DEC 13 2011 Office: VERMONT SERVICE CENTER FILE: [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:

[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 the $630 fee. 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, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks immigrant classification pursuant to 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 U.S. citizen spouse.

On March 24, 2011, the director denied the petition based on his determination that the petitioner was not a person of good moral character because he had been convicted of an aggravated felony.

On appeal, counsel submits a supplemental brief.

Relevant Law and Regulations

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).

In regards to determining a self-petitioner's moral character, section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C), provides:

> Notwithstanding section 101(f), an act or conviction that is waivable with respect to the petitioner for purposes of a determination of the petitioner's admissibility under section 212(a) or deportability under section 237(a) shall not bar the [Secretary of Homeland Security] from finding the petitioner to be of good moral character under subparagraph (A)(iii), A(iv), (B)(ii), or (B)(iii) if the [Secretary] finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty.

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.

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:

> *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 Mexico who entered the United States without inspection on or about January 1, 1996. The petitioner married, D-C-, a U.S. citizen, on February 12, 2000 in Bartlesville, Oklahoma.[1] After U.S. Citizenship and Immigration Services (USCIS) denied the petition for alien relative (Form I-130), filed by the petitioner's wife on his behalf and the petitioner's corresponding application to adjust status (Form I-485), the petitioner was charged with remaining in the United States beyond his period of authorized stay and placed in removal

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

proceedings.[2]

The petitioner filed the instant Form I-360 on June 5, 2009. The director subsequently issued a request for evidence (RFE) of the petitioner's good moral character. The petitioner, through counsel, timely responded with additional evidence, which the director found insufficient to establish the petitioner's eligibility. The director then issued a notice of intent to deny (NOID) the petition, finding that the petitioner's conviction in Oklahoma for domestic abuse on January 31, 2001 is a crime involving moral turpitude and an aggravated felony, preventing him from establishing good moral character under section 101(f) of the Act. Counsel responded to the NOID with additional evidence. The director reviewed the evidence and denied the petition with a determination that the petitioner is statutorily barred from establishing his good moral character because he has been convicted of a crime of violence as defined in 18 U.S.C. § 16, which is an aggravated felony. Counsel filed a timely appeal.

The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A full review of the record, including the evidence submitted on appeal, fails to establish the petitioner's eligibility. Counsel's claims do not overcome the director's grounds for denial and the appeal will be dismissed for the following reasons.

Good Moral Character

The record reflects that the petitioner was convicted on January 31, 2001 in the District Court of Washington County, Oklahoma of domestic abuse, a misdemeanor, under section 644(C) of the Oklahoma Statutes. He was sentenced to a term of imprisonment for one year in the Washington County jail, with all but the first five days suspended (Case No. CM-2000-769). Although the petitioner's sentence was suspended in full, it is considered a term of imprisonment under the Act. *See* Section 101(a)(48)(B) of the Act, 8 U.S.C. § 1101(a)(48)(B).

At the time of the petitioner's conviction, section 644(C) of the Oklahoma Statutes provided, in pertinent part, "Any person who commits any assault and battery against a current or former spouse . . . shall be guilty of domestic abuse." Assault is defined as "any willful and unlawful attempt or offer with force or violence to do a corporal hurt to another." Okla. Stat. Ann. tit. 21 § 641 (West 2001). Battery is defined as "any willful and unlawful use of force or violence upon the person of another." Okla. Stat. Ann. tit. 21 § 642 (West 2001). To perform an act toward the commission of a battery is to commit an assault. *Joplin v. State*, Okla.Crim.App., 663 P.2d 746 (1983).

Section 101(f)(8) of the Act, 8 U.S.C. § 1101(f)(8), prescribes that no person shall be found to have good moral character if he or she at any time has been convicted of an aggravated felony. The director determined that the petitioner's conviction was an aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), which proscribes "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of

[2] The petitioner remains in removal proceedings before the Chicago Immigration Court and his next hearing is scheduled for December 19, 2011.

imprisonment [is] at least one year." Section 16 of title 18, United States Code provides that the term "crime of violence" means "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

On appeal, counsel asserts that the petitioner's conviction does not meet the definition of a crime of violence under 18 U.S.C. §16(b) because it is not a felony. Counsel further asserts that the petitioner's offense does not meet the definition of a crime of violence under 18 U.S.C. § 16(a) because the statute under which the petitioner was convicted does not have as an element the use of violent force, which is required by the Seventh Circuit Court of Appeals and Board of Immigration Appeals (BIA). Counsel states that under *LaGuerre v. Mukasey*, 526 F.3d 1037 (7th Cir. 2008) and *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), the Seventh Circuit held that an adjudicator is limited to looking at the statutory elements when determining if an offense meets the definition of a crime of violence. Counsel states that the Seventh Circuit in *Flores v. Ashcroft* and the Board of Immigration Appeals in *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010) "have held that in order to constitute a crime of violence, the offense must have violent force as an element." Counsel contends that "[t]here is no case precedent or other support for finding that the Oklahoma battery statute requires as an element violent force." Counsel concludes that because violent force is not an element of the statute, the petitioner has not been convicted of a crime of violence.

Upon a review of the relevant precedent decisions, we are not persuaded by counsel's assertions. In *Flores v. Ashcroft*, the Seventh Circuit Court of Appeals, within whose jurisdiction this case arose, determined that "the language of § 16(a), which specifies that the offense of conviction must have 'as an element' the use or threatened use of physical force." 350 F.3d at 670. The Seventh Circuit noted that 18 U.S.C. § 16 has "adopts a charge-offense rather than a real-offense approach." *Id.* The Court, however, stated that a review beyond the categorical approach could be made "when one state-law offense may be committed in multiple ways, and federal law draws a distinction." *Id.* The Court noted that in such a situation, it is necessary to "look behind the statutory definition" and "rely on some aspects of the defendant's actual behavior." *Id.* The court held that the element of "force" under 18 U.S.C. § 16 must be "violent in nature- the sort that is intended to cause bodily injury, or at a minimum likely to do so." *Id.* at 672. The BIA in *Matter of Valesquez* took a similar approach, and held that "because the Virginia statute reaches conduct that cannot be classified as 'violent force,' the respondent's offense is not categorically a 'crime of violence'." 25 I&N Dec. at 283. The BIA then remanded the matter to the Immigration Judge "to determine whether the respondent's offense qualifies as a crime of domestic violence under the modified categorical approach." *Id.*

Assault and battery – the crimes underlying the petitioner's conviction for domestic abuse – are divisible statutes because they can be completed by either "force" or "violence." Since domestic abuse under the Oklahoma Statutes is not categorically a crime of violence, we must review the record of conviction under the modified categorical approach to determine whether the petitioner's crime involves "violent force." Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to

conclude that the alien was convicted of the elements of the generically defined crime. *Shepard v. U.S.*, 544 U.S. 13 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. 544 U.S. at 26.

The record of conviction in this this case includes the information, which provides that the petitioner was charged with committing the crime of domestic abuse in violation of section 644(C) of the Oklahoma Statues by "unlawfully, willfully, and wrongfully commit[ting] an assault and battery upon the person one [D-C-], his wife by then and there kicking her in the face, upper right arm and left leg, leaving red marks in each of the areas, *with force and violence* and with the unlawful intent to do her corporal hurt and bodily injury, and did, then and there, commit the crime of DOMESTIC ABUSE" (first emphasis added). The record of conviction establishes that the petitioner used "violent force" and therefore was convicted of a crime of violence as defined under 18 U.S.C. § 16(a). Accordingly, the petitioner was convicted of an aggravated felony, which precludes a finding of his good moral character pursuant to section 101(f)(8) of the Act.

On appeal, counsel asserts that if we determine that the petitioner's offense "constitutes an aggravated felony, he is eligible for an exception to the good moral character bar" under section 204(a)(1)(C) of the Act "because the conviction is a waivable offense and it was tied to the battery and extreme cruelty." Counsel states that since the petitioner has never been admitted to the United States, the grounds of deportability under section 237 of the Act do not apply to him and he is eligible for a section 212(h) of the Act waiver of his inadmissibility. Counsel contends that "applicants for admission who have never been admitted for lawful permanent residence may waive an aggravated felony conviction under [section] 212(h) [of the Act]." Counsel concludes that section 204(a)(1)(C) of the Act does not require the petitioner to show that he is eligible for a waiver of deportability as well as a waiver of inadmissibility.

We find no error in the director's determination that the petitioner is statutorily barred from establishing his good moral character because he has been convicted of an aggravated felony. The statutory bar to good moral character for aliens convicted of aggravated felonies under section 101(f)(8) of the Act is applicable to all aliens, regardless of whether they are inadmissible or deportable. Under section 212(h) of the Act, 8 U.S.C. § 1182(h), a waiver is available to aliens who are inadmissible for having been convicted of crimes involving moral turpitude or certain controlled substance violations, but does not apply to aggravated felony convictions. Although the petitioner's offense is also a crime involving moral turpitude, he must still show that his conviction is waivable as an aggravated felony.[3]

Section 237(a)(2)(A)(vi) of the Act, 8 U.S.C. § 1127(a)(2)(A)(vi), provides a deportability waiver for aliens convicted of an aggravated felony who have been granted a full and unconditional pardon by the President of the United States or by a State Governor. United States Citizenship and Immigration

[3] Although inadmissibility for crimes involving moral turpitude is waivable under section 212(h) of the Act, no purpose would be served in determining, under section 204(a)(1)(C) of the Act, whether the petitioner's conviction for domestic abuse is connected to D-C-'s abuse since the petitioner remains barred from establishing his good moral character for having been convicted of an aggravated felony.

Services (USCIS) does not have the authority to grant such a pardon and the record does not indicate that the petitioner has received such a pardon. Consequently, the "waiver authorized" by section 237(a)(2)(A)(vi) of the Act is not "waivable with respect to the petitioner" in this case under section 204(a)(1)(C) of the Act. The present record thus fails to establish the petitioner's good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.[4]

Conclusion

On appeal, the petitioner has failed to overcome the director's determination that he is not a person of good moral character. He is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

In these proceedings, the petitioner bears the burden of proof to establish his eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met. Accordingly, the appeal will be dismissed and the petition will remain denied for the reasons stated above.

ORDER: The appeal is dismissed.

[4] The record also reflects that on November 20, 2006, the petitioner was convicted in Berrien County, Michigan of attempted beverage container return of a non-returnable container in violation of section 445.574a(2)(b) of the Michigan Complied Laws. No purpose would be served in addressing the impact of this conviction on his good moral character since the petitioner remains barred from establishing his good moral character for having been convicted of an aggravated felony.