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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**

B9



Date: **DEC 19 2011**

Office: VERMONT SERVICE CENTER

FILE: 

IN RE: Petitioner: 

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:

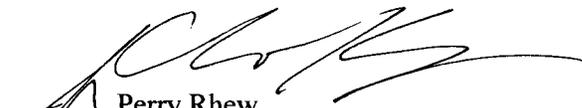
SELF-REPRESENTED

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 former U.S. citizen spouse.

On April 28, 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, the applicant submits a supplemental statement and additional evidence.

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 stateless Palestinian who was admitted to the United States on August 21, 2002 as an F-1 student. The petitioner married, M-H-, a U.S. citizen, on July 22, 2003 in Denton, Texas. M-H- subsequently filed an alien relative petition (Form I-130) on the petitioner's behalf and the petitioner filed a corresponding adjustment application (Form I-485).¹ On October 17, 2005, the petitioner was

¹ On appeal, the petitioner refers to M-H- as his "x-wife," indicating that their marriage has now been terminated in a divorce. Although the record does not contain a divorce decree establishing the date of the termination, police records related to the petitioner's October 2007 arrest for sexual assault state that at the

convicted in the Denton County, Texas Criminal Court of assault causing bodily injury (family violence) in violation of section 22.01 of the Texas Penal Code, and placed on community supervision under specified terms and conditions. On December 14, 2005, Department of Homeland Security (DHS) charged the petitioner with being subject to removal as an alien who has been convicted of a crime of domestic violence and issued a notice to appear in removal proceedings.²

The director of the Vermont Service Center subsequently issued a request for evidence of the petitioner's good moral character to establish his eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act. The record indicates that the petitioner failed to timely respond to the request with additional evidence. On April 28, 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. The petitioner has 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. The petitioner's claims and the evidence submitted on appeal do not overcome the director's grounds for denial and the appeal will be dismissed for the following reasons.

Good Moral Character

On appeal, the petitioner asserts that he submitted additional evidence in response to the RFE in a timely manner. He contends that after his former spouse accused him of sexual assault "she herself had tried to fix her false allegation" and "spoke to the District Attorney to drop charges and signed an affidavit of non-prosecution, but the DA wanted a conviction anyway." The petitioner states that his former wife stays in touch with him and has visited him multiple times during his incarceration. He states that he is a good person and has a college degree. He notes that he is a "great father, son, brother and friend." The petitioner claims that he has served four years for a crime that he did not commit. The petitioner submits letters of support, correspondence from his former spouse, and a copy of an

time of the petitioner's arrest he had been divorced from M-H- for one year.

² On April 7, 2009, an immigration judge with the Dallas Immigration Court administratively closed the petitioner's removal proceedings because he was in state custody at the time of his last hearing.

³ Although the petitioner did not provide court records related to these arrests, dispositions for these offenses can be found at the [REDACTED] online records search at [REDACTED]

affidavit his former spouse submitted to the District Attorney requesting a dismissal of the charge of sexual assault against the petitioner.

Inasmuch as the petitioner avers his lack of culpability, we cannot look behind his conviction to reassess his guilt or innocence. *See Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031 (BIA 1999); *Matter of Fortis*, 14 I&N Dec. 576 (BIA 1974).

The regulation at 8 C.F.R. § 204.2(c)(1)(vii) provides that 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. 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.

In considering whether the respondent's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 601 (1990). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then see if there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In applying this approach, the alien "may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

If the alien demonstrates a "realistic probability" that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. 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.

In accordance with *Taylor v. United States*, *supra*, we will first see if the petitioner's conviction is categorically an aggravated felony. The director determined that the petitioner's [REDACTED] was an aggravated felony defined under section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A), as: "murder, rape or sexual abuse of a minor." The term "rape" is not further defined in the United States Code. We must therefore define "rape" by "employing the ordinary, contemporary, and common meaning" of that word." *Castro-Baez v. Reno*, 217 F.3d 1057, 1059 (9th

Cir. 2000) (quoting *United States v. Baron-Medina*, 187 F.3d 1444 (9th Cir. 1999); *See also Taylor v. United States*, 495 U.S. 575, 594 (the Supreme Court construed the term “burglary” for sentencing enhancement purposes using a generic and contemporary definition of the term.). The Model Penal Code § 213.1(1)(a) provides that “[a] male who has sexual intercourse with a female not his wife is guilty of rape if he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone.”

Section 22.011(a)(1) of the Texas Penal Code is not categorically an aggravated felony because the full range of conduct covered by the criminal statute does not fall within the meaning of the generic definition of “rape.” At the time of the petitioner’s conviction, the statute provided that a person commits sexual assault if the person intentionally or knowingly: (A) causes the penetration of the anus or sexual organ of another person by any means, without that person’s consent; (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person’s consent; or (C) causes the sexual organ of another person, without that person’s consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor. Tex. Penal Code Ann. § 22.011(a)(1) (West 2009). The judgment does not specify under which sub-subsection of section 22.011(a)(1) of the Texas Penal Code the petitioner was convicted. Section 22.011(a)(1) of the Texas Penal Code is a divisible statute since it encompasses offenses that include rape, as well as offenses that do not. Sub-subsections 22.011(a)(1)(B) and (C) of the Texas Penal Code criminalize conduct that does not involve “sexual intercourse,” while sub-subsection (A) criminalizes conduct that involves “sexual intercourse.” However, there is a “realistic probability” that even section 22.011(a)(1)(A) of the Texas Penal Code would be applied to conduct that falls outside the generic definition of the crime of rape because it involves penetration “by any means.” For example, in *Suarez v. State*, 901 S.W.2d 712 (1995), the Court of Appeals of Texas affirmed a sexual assault conviction under section 22.011(a)(1)(A) of the Texas Penal Code where the defendant’s conduct involved inappropriate touching of the victim.

Since section 22.011(a)(1) of the Texas Penal Code is not categorically an aggravated felony under section 101(a)(43)(A) of the Act, we will apply a modified categorical approach by conducting 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 of rape. *Shepard v. United States*, 544 U.S. 13, 26 (2005). The indictment charging the petitioner with the crime of sexual assault provides that on October 27, 2007, the petitioner “did then and there intentionally or knowingly cause the penetration of the female sexual organ of [M-H-] by defendant’s sexual organ, without the consent of [M-H-].” Subsections 22.011(b)(1),(2) of the Texas Penal Code provide that sexual assault is without the consent of the other person if: the actor compels the other person to submit or participate by the use of physical force or violence; or the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat. On appeal, the petitioner states that he and M-H- were no longer married at the time. Therefore, the petitioner was convicted for conduct that falls within the generic definition of the crime of rape, an aggravated felony under section 101(a)(43)(A) of the Act.

Section 204(a)(1)(C) of the Act provides that 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. However, section 237(a)(2)(A)(vi) of the Act, 8 U.S.C. § 1127(a)(2)(A)(vi), only 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 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 petitioner's convictions for assault causing bodily injury (family violence), theft and sexual assault are also crimes involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), which bar a finding of his good moral character pursuant to section 101(f)(3) of the Act. 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 convictions for crimes involving moral turpitude are connected to M-H's abuse since the petitioner remains barred from establishing his good moral character for having been convicted of an aggravated felony. The present record thus fails to establish the petitioner's good moral character, as required by section 204(a)(1)(B)(ii)(II)(bb) of the Act.

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.