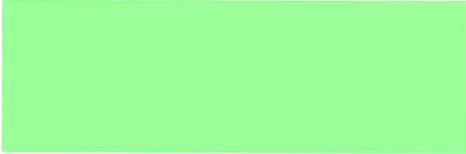


(b)(6)

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



Date: **FEB 14 2013** 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:

**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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630 or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5.

**Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Vermont Service Center, (“the director”), denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion to reconsider will be granted. The appeal will remain dismissed and the petition will remain denied.

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.

The director denied the petition for failure to establish that the petitioner was a person of good moral character. In its December 13, 2011 decision dismissing the appeal, the AAO found that the petitioner did not establish the requisite good moral character because he had been convicted of an aggravated felony. On motion, 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:

(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.<sup>1</sup> 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

<sup>1</sup> Name withheld to protect the individual's identity.

January 31, 2001 is a crime involving moral turpitude (CIMT) 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. The AAO affirmed the director's decision and counsel filed a timely motion to reconsider.

Counsel's submission meets the requirements for a motion to reconsider at 8 C.F.R. § 103.5(a)(3). Although much of counsel's arguments on motion are repeated statements from below, counsel also asserts that the AAO incorrectly applied the pertinent law to find the petitioner's conviction to be an aggravated felony and determine that he was ineligible for the exception at section 204(a)(1)(C) of the Act. Counsel argues that even if the petitioner was convicted of an aggravated felony, the conviction is also a CIMT and is therefore waivable for self-petitioners under section 212(h)(1)(C) of the Act, 8 U.S.C. § 1182(h)(1)(c), permitting the petitioner to establish his good moral character pursuant to section 204(a)(1)(C) of the Act because his conviction was connected to his wife's abuse.

The motion is granted and 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 brief submitted on motion, fails to establish the petitioner's eligibility. Upon reconsideration, the prior decision of the AAO will be affirmed. The appeal will remain dismissed for the following reasons.

#### *Good Moral Character*

In its prior decision, the AAO determined that the petitioner had not established that he is a person of good moral character because he was convicted on January 31, 2001 in the [REDACTED] Oklahoma of domestic abuse, a misdemeanor, under title 21, section 644(C) of the Oklahoma Statutes (hereinafter "section 644(C)"). He was sentenced to a term of imprisonment for one year in the [REDACTED] jail, with all but the first five days suspended (Case No. CM-2000-769). Although the petitioner's sentence was suspended, it is still 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." 21 Okla. Stat. Ann. § 641 (West 2001). Battery is defined as "any willful and unlawful use of force or violence upon the person of another." 21 Okla. Stat. Ann. § 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, 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 imprisonment [is] at least one year.” Title 18, section 16 of the 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.”

Upon a full review of the relevant case law, the AAO determined that the petitioner failed to establish the requisite good moral character for the following reasons: (1) assault and battery under Oklahoma law – the crimes underlying the petitioner’s conviction for domestic abuse – are divisible statutes because they can be completed by “force or violence;” (2) contrary to counsel’s argument on appeal, *Flores v. Ashcroft*, 350 F.3d 666, 670 (7<sup>th</sup> Cir. 2003), stated that the modified categorical approach is warranted where the statute of conviction is divisible; (3) because section 644(C) of the Oklahoma statutes was divisible, it was necessary to review the record of conviction under the modified categorical approach to determine whether the petitioner’s crime involved the “violent force” required to constitute a crime of violence under 18 U.S.C. § 16(a); (4) the record of conviction showed that the petitioner used “violent force” against his wife and was convicted of a crime of violence aggravated felony as defined under 18 U.S.C. § 16(a) and section 101(a)(43)(F) of the Act; and (5) consequently the petitioner was statutorily barred from establishing good moral character as an aggravated felon and was not eligible for the exception at section 204(a)(1)(C) of the Act.

On motion, counsel restates much of her previous claims which were addressed in the prior AAO decision incorporated here by reference. On motion, counsel again asserts that the petitioner’s conviction is not an aggravated felony because section 644(C) is not divisible and does not contain violent force as an element. Counsel claims that the Oklahoma statute is not divisible because a conviction may be secured under section 644(C) with only the slightest touching and other subsections of the statute require an intent to inflict bodily harm.

Counsel’s claims are not persuasive. Section 644(C) requires “force or violence” and is clearly divisible. While the slightest touching may suffice for “force,” such minimal conduct does not render the statute indivisible. The modified categorical approach is warranted when, as here, “the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not.” *Johnson v. U.S.*, 130 S.Ct. 1265, 1273 (2010).

Counsel further asserts that the AAO erred in relying on the petitioner’s charging document, which she claims is not part of the record. As the Supreme Court has held, application of the modified categorical approach involves an examination of the record of conviction, “including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.” *Id.* In this case, the petitioner’s administrative record contains the Information in his criminal case and his Judgment and Sentence,<sup>2</sup> which show that he

<sup>2</sup> Because counsel claims the Information was not part of the record, we now provide counsel with a copy of

pled guilty to the following charge in the Information:

...unlawfully, willfully, and wrongfully commit an assault and battery upon the person of 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 under section 101(a)(43)(F) of the Act, which precludes a finding of his good moral character pursuant to section 101(f)(8) of the Act.

On motion, counsel reasserts, in the alternative, that regardless of whether the petitioner’s conviction is an aggravated felony, it is waivable as a CIMT, permitting a finding of his good moral character under section 204(a)(1)(C) of the Act. Counsel claims that categorizing his offense as an aggravated felony does not change the petitioner’s eligibility for a waiver of his offense as a CIMT under section 212(h) of the Act, 8 U.S.C. § 1182(h), because he has never been admitted to the United States. Counsel cites to *Matter of Michel*, a Board of Immigration Appeals (BIA) decision where the BIA held that a Haitian national who was convicted of a crime that was both an aggravated felony and a CIMT was not precluded from applying for adjustment of status as the beneficiary of an approved family-based visa petition because he was not previously admitted to the U.S. and an aggravated felony conviction is not a ground of inadmissibility. *See Matter of Michel*, 21 I&N Dec. 1101, 1103 (BIA 1998). The BIA determined that the respondent was eligible to apply for a 212(h) waiver of inadmissibility for his offense as a CIMT and establish eligibility for adjustment of status because 212(h) of the Act specifically precluded waiver eligibility for lawful permanent residents convicted of an aggravated felony but did not impose such restrictions on one who has not been previously admitted as a lawful permanent resident. *Id.* at 1104. Counsel argues that the same principle applies to the instant case and the petitioner is eligible for a waiver under section 212(h) of the Act as someone convicted of a CIMT who has never been admitted to the U.S. notwithstanding the fact that his offense is also an aggravated felony.

*Matter of Michel* is inapplicable to the petitioner’s case because the respondent in *Michel* was the beneficiary of an approved immediate relative visa petition under section 204(a)(1)(A)(i) of the Act, which contains no explicit, statutory requirement to show good moral character. In *Matter of Michel*, the BIA explained that a waiver under section 212(h) and adjustment of status under section 245 of the Act are forms of discretionary relief and the alien’s conviction was not a statutory bar. *Id.* at 1105. In the instant case, however, section 204(a)(1)(A)(iii)(II)(bb) of the Act explicitly requires the petitioner to establish that he is a person of good moral character and section 101(f)(8) of the Act

that document. As the Information has been part of the petitioner’s administrative record since December of 2004, we find no error in the AAO’s reliance on the Information in its prior and present decisions. The record in this case indicates that the petitioner was aware of his criminal charge. The record reveals no violation of the regulation at 8 C.F.R. § 103.2(b)(16) in regards to the use of derogatory information.

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. Here, 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 self-petitioners, regardless of whether they are inadmissible or deportable. Counsel fails to establish that the petitioner is not statutorily barred from showing good moral character.

Moreover, even though the petitioner's offense is also a CIMT, to be eligible for the exception at section 204(a)(1)(C) of the Act and establish his good moral character, the petitioner must still show that his conviction is waivable as an aggravated felony. 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 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" for aggravated felonies 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 and he is not eligible for that exception to the bar against a finding of his good moral character.

On motion, counsel further asserts that the petitioner, his wife and mother-in-law provided credible explanations of the events leading to his conviction which show that he did not, in fact, abuse his wife and that his conviction was actually tied to her battery and extreme cruelty. We do not question the petitioner's credibility, nor do we withdraw the director's determination that the petitioner's wife subjected him to battery or extreme cruelty. When evaluating the statutory classification of the petitioner's criminal offense, however, we cannot look behind the record of 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 petitioner's conviction has not been vacated on the merits or based on another legal defect in the criminal proceedings and his conviction was an aggravated felony for which he has not received a presidential or gubernatorial pardon. Consequently, sections 101(a)(43)(F), (a)(48)(A), (f)(8) and 204(a)(1)(A)(iii)(II)(bb) of the Act bar a finding of his good moral character.

### *Conclusion*

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. On motion, the petitioner has failed to demonstrate that he is a person of good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. He is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and the appeal will remain dismissed.

**ORDER:** The December 13, 2011 decision of the Administrative Appeals Office is affirmed. The appeal remains dismissed and the petition remains denied.