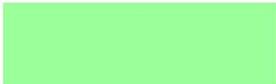


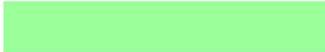


U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **MAY 08 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)

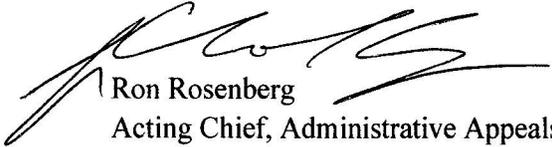
ON BEHALF OF PETITIONER:

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 Director, Vermont Service Center, (“the director”) 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 her U.S. citizen spouse.

The director denied the petition because the petitioner’s controlled substance offense demonstrated that she lacked good moral character. 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 petitioner’s good moral character, section 204(a)(1)(C) of the Act states:

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 further 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.

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. 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.

Pertinent Facts and Procedural History

The petitioner is a citizen of Mexico who entered the United States on May 19, 2001 as a nonimmigrant visitor. The petitioner married a U.S. citizen on October 20, 2007 in [REDACTED] California. The petitioner filed the instant Form I-360 on May 9, 2011. The director subsequently issued a Request for Evidence (RFE) of, *inter alia*, the petitioner's good moral character, and then a Notice of Intent to Deny (NOID) based on the same ground. The petitioner, though counsel, timely responded to the RFE and NOID, but the director found the evidence insufficient to establish the petitioner's eligibility. The director denied the petition and counsel timely appealed.

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 fails to establish the petitioner's eligibility. Counsel's claims do not overcome the director's ground for denial and the appeal will be dismissed for the following reasons.

Good Moral Character

Section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3), prescribes, in pertinent part, that no person shall be found to have good moral character if he or she is a member of one or more of the classes of persons, whether inadmissible or not, described in subparagraph (C) of section 212(a)(2), except as such paragraph relates to a single offense of simple possession of thirty grams or less of marijuana. The director correctly determined that the petitioner is a member of the class of persons described at section 212(a)(2)(C)(i), 8 U.S.C. § 1182(a)(2)(C)(i), controlled substance traffickers.

Section 212(a)(2)(C) of the Act provides, in pertinent part:

Controlled Substance Traffickers - Any alien who the consular officer or the [Secretary, Department of Homeland Security] 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 . . . is inadmissible.

A finding of inadmissibility as a controlled substance trafficker must be based upon “reasonable, substantial, and probative evidence.” *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000); *Matter of Rico*, 16 I&N Dec. 181, 185 (BIA 1977). A reasonable basis exists to conclude that an alien is a controlled substance trafficker where the alien is found in possession of a large quantity of a controlled substance indicating that the drug was not intended for the alien's personal use. *Matter of Rico*, 16 I&N Dec. at 186.

In this case, the record shows that on December 5, 2001, the petitioner was arrested at a United States port of entry from Mexico as a passenger of a vehicle containing approximately 76 pounds of marijuana. The petitioner was charged with possession of marijuana for sale in violation of section 11359 of the California Health and Safety Code and transportation of more than 28.5 grams of marijuana, not for personal use in violation of section 11360(a) of the California Health and Safety Code and section 1210(a) of the California Penal Code. On December 18, 2001, the petitioner was convicted in the Superior Court of California, [REDACTED] of unauthorized possession of concentrated cannabis, a felony, in violation of section 11357(a) of the California Health and Safety Code. Based on the large quantity of marijuana discovered in the vehicle, the record contains reasonable, substantial, and probative evidence of the petitioner's drug-trafficking activity.

In her September 12, 2012 statement submitted in response to the NOID, the petitioner recounted that at the time of her conviction, she resided in [REDACTED] Mexico and her former boyfriend resided in [REDACTED] California. She stated that she and her son, who was five years old at the time, traveled with her boyfriend's brother in a vehicle from Mexico to the United States to visit her boyfriend. The petitioner recounted that at the United States port-of-entry she was arrested and told that there was marijuana in the vehicle and that her boyfriend's brother had said the car belonged to her. The petitioner informed the officers that she did not own the vehicle, but the officers told her that it was also her fault since she was in the vehicle. The petitioner recounted that she was in jail for approximately 19 days and she was concerned about her son and family. She explained that at the last court hearing, her lawyer told her that the only way for her to get out of jail soon was to plead guilty to drug possession. She stated:

I didn't hesitate and declared myself guilty. I went through the worst being in that place and not knowing about my family. It was going to be Christmas [and] all I wanted was to spend it with them. Maybe by writing this letter I have forgotten many of the things I went through, but I was not the one driving nor was the car mine. I didn't do anything but my decision of being proved guilty was only my concern of being with my family on Christmas.

Inasmuch as the petitioner avers her lack of culpability, we cannot look behind her conviction to reassess her guilt or innocence. *See Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1034 (BIA 1999) (unless a judgment is void on its face, an administrative agency cannot go behind the judicial record to determine an alien's guilt or innocence); *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1974) (same).

On appeal, counsel asserts that the petitioner was convicted of possession of concentrated cannabis, not marijuana for sale and transportation. Counsel states that after the petitioner fulfilled the requirements of her probation, her conviction was reduced to a misdemeanor and expunged under section 1203.4 of the California Penal Code, a state rehabilitative statute. Counsel asserts that the petitioner's drug conviction is no longer valid for immigration purposes pursuant to the Ninth Circuit Court of Appeals holding in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).¹ The Ninth Circuit has overruled *Lujan-Armendariz*, although its decision applies only prospectively to those aliens convicted after July 14, 2011. *Nunez-Reyes v. Holder*, 646 F.3d 684, 694 (9th Cir. 2011).

Regardless of whether the petitioner's offense may constitute a conviction under *Lujan*, a conviction is not required to establish inadmissibility under section 212(a)(2)(C) of the Act, as a finding that the petitioner was involved in drug trafficking can be based upon another "reason to believe." *Alarcon-Serrano v. I.N.S.*, 220 F.3d at 1119. In this case, the record contains reasonable, substantial and probative evidence providing a reason to believe that the petitioner was a controlled substance trafficker or that she knowingly aided, abetted, assisted, conspired, or colluded with others in the

¹ In *Lujan-Armendariz*, the Ninth Circuit held that an alien who had been convicted as a first-time offender of attempted possession of narcotic drugs under Arizona law, whose sentence was suspended and ultimately expunged, did not stand "convicted" for immigration purposes, because the alien would have qualified for treatment under the Federal First Offender Act (FFOA) had he been charged with federal offenses. 222 F.3d at 749.

illicit trafficking of a controlled substance. The administrative record of the petitioner's arrest states that she was a passenger in a vehicle containing approximately 76 pounds of marijuana. In the NOID and the director's decision, counsel and the petitioner were twice provided full notice of this derogatory evidence. The petitioner's charging document, judgment and sentence, as well as her admission that she pled guilty further support a determination that she falls within section 212(a)(2)(C)(i) of the Act.

There is no connection between the petitioner's offense and her husband's abuse because her conviction occurred five months before she stated she met her husband and almost six years before their marriage. There is also no waiver of inadmissibility under section 212(a)(2)(C)(i) of the Act. Consequently, the petitioner is ineligible for a discretionary determination of her good moral character despite her conviction pursuant to section 204(a)(1)(C) of the Act. Accordingly, subsection 101(f)(3) of the Act bars a finding of the petitioner's good moral character.

Even if the petitioner's unlawful act did not fall within an enumerated provision of section 101(f) of the Act, the record still shows that she lacks good moral character. Section 101(f) of the Act states, in pertinent part, that "[t]he 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."

Primary evidence of good moral character is the self-petitioner's affidavit. 8 C.F.R. § 204.2(c)(2)(v). In her first statement submitted initially, the petitioner did not acknowledge her conviction or otherwise address her moral character. In her September 12, 2012 letter submitted in response to the NOID, the petitioner recounted that she was scared and in shock when the officers told her there was marijuana in the car. She explained that she pled guilty in order to be released from jail and reunited with her son and family before Christmas. She did not, however, acknowledge responsibility for her actions or discuss her subsequent rehabilitation. The petitioner's brief description of the events surrounding her offense fails to establish that she was convicted under extenuating circumstances. While the record shows that the petitioner completed probation for her offense, she does not discuss in any probative detail how, for example, she has taken responsibility for her actions and rehabilitated such that her good moral character could be established despite her conviction.

The remaining, relevant evidence also does not overcome the petitioner's offense to establish her good moral character. The record shows that the petitioner operates a beauty salon and once donated \$50.00 to the [REDACTED] to support a cross country program. The petitioner also submitted letters from three friends, [REDACTED]

Although Ms. [REDACTED] describes the petitioner as a wonderful mother, close to her family, dedicated to her business and possessing high moral values, Ms. [REDACTED] states that she has known the petitioner since 2007, after the petitioner's conviction, and she does not indicate that she is aware

of the petitioner's criminal record. Ms. [REDACTED] also describes the petitioner as a hard-working, loving mother and daughter, but although she states she has known the petitioner since 2002, Ms. [REDACTED] asserts that she has never been aware of the petitioner "getting into serious trouble." Ms. [REDACTED] recounts how the petitioner hired and mentored her and describes the petitioner as "all about moral behavior and helping others." However, Ms. [REDACTED] states that she has only known the petitioner since 2008 and does not indicate that she is aware of the petitioner's criminal offense. The petitioner's friends' unawareness of her criminal history indicate that they cannot knowledgeably attest to her good moral character, as required of supporting affidavits by the regulation at 8 C.F.R. § 204.2(c)(2)(v).

The petitioner's drug conviction bars a finding of her good moral character pursuant to subsection 101(f)(3) of the Act. In addition, the petitioner committed an unlawful act, which adversely reflects upon her moral character and prevents a finding that she is a person of good moral character pursuant to the final paragraph of section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii). She has therefore failed to demonstrate her good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

Conclusion

In these proceedings, the petitioner bears the burden of proof to establish her 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 appeal, the petitioner has failed to establish that she is a person of good moral character. She is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act. Accordingly, the appeal will be dismissed and the petition will remain denied.

ORDER: The appeal is dismissed.