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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

Date: OCT 0 7 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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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, the petitioner submits a 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 petitioner's good moral character, section 101(f) of the Act, 8 U.S.C. 1101(f), states in pertinent parts:

> 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--
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> . . .
>
> (3) a member of one or more of the classes of persons, whether inadmissible or not, described in . . . subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 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;
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> . . .
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> (8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section);
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> . . . .
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> 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. . . .

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 Guatemala who entered the United States on November 10, 2002 as a nonimmigrant visitor. The petitioner married a U.S. citizen on February 14, 2009 in Spotsylvania, Virginia.[1]

The petitioner filed the instant Form I-360 on July 26, 2010. The director subsequently issued two Requests for Evidence (RFEs) of, among other things, the petitioner's good moral character. The petitioner timely responded to the RFEs, but the director found the evidence insufficient to establish the petitioner's eligibility. The director denied the petition and the petitioner 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, including the evidence submitted on appeal, fails to establish the petitioner's eligibility. The evidence submitted on appeal does not overcome the director's grounds for denial and the appeal will be dismissed for the following reasons.

Good Moral Character

The petitioner's record of conviction reflects that in March 2011 she was charged with conspiracy to manufacture, distribute and possess with intent to distribute 1,000 and more marijuana plants in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) and 846. The petitioner pled guilty to the

[1] The petitioner adjusted to conditional permanent resident status on November 4, 2009. Because she did not file a Petition to Remove the Conditions of Residence (Form I-751), her conditional permanent resident status terminated on November 4, 2011, the second anniversary of the date of which she was granted conditional status. Section 216A(c)(2)(A)(i) of the Act, 8 U.S.C. § 1186b(c)(2)(A)(i).

offense in the United States District Court for the Southern District of New York. The court adjudicated her guilty and sentenced her to time served in prison (20 months and 7 days), supervised release for two years, and payment of a monetary penalty.

On appeal, the petitioner states that the charge was dismissed and "the case is done." She submits a May 14, 2013 judgment from the United States District Court for the Southern District of New York reflecting that the court dismissed the underlying indictment on the motion of the United States government. The judgment does not state the underlying reason for the dismissal. A conviction vacated due to procedural or substantive defects in the criminal proceedings will not be considered for immigration purposes, but a conviction vacated for rehabilitative or immigration reasons remains valid in immigration proceedings. *See Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006) (affirming this interpretation of conviction at section 101(a)(48)(A) of the Act, as stated by the Board of Immigration Appeals in *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), while vacating that decision on other grounds). The petitioner has not shown that her conviction was vacated based on a procedural or substantive defect in the underlying proceedings. Consequently, for immigration purposes, the petitioner retains a conviction under section 101(a)(48)(A) of the Act.

In her January 6, 2013 statement submitted on appeal, the petitioner explains that she moved to a house her brother and cousin were renting in New York to escape her physically abusive husband. She states that the owner of the house kept marijuana plants in the basement. The petitioner recounts that four months after she moved into the house, she and the other occupants of the house were arrested. 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).

Section 101(f)(3) of the Act 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 subparagraphs (A) and (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.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
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> (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),

is inadmissible.

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

> Any alien who the consular officer or the [Secretary, Department of Homeland Security] knows or has reason to believe –
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> (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.

The petitioner's conviction bars a finding of her good moral character pursuant to three provisions of section 101(f)(3) of the Act. First, the petitioner's conviction for conspiracy to manufacture, distribute and possess with intent to distribute 1,000 and more marijuana plants is a violation of a United States law relating to a controlled substance as defined under section 212(a)(2)(A)(i)(II) of the Act.[2] Second, the petitioner's conviction constitutes a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act. *See Matter of Khourn*, 21 I&N Dec. 1041, 1047 (BIA 1997) (possession of a controlled substance with intent to distribute is a crime involving moral turpitude). Third, the petitioner's conviction falls within section 212(a)(2)(C)(i) of the Act as a drug trafficking offense because the record shows a "reason to believe" that the petitioner illicitly trafficked a controlled substance.

A reason to believe an alien was a drug trafficker must be based on "reasonable, substantial, and probative evidence." *See Igwebuike v. Caterisano*, 230 Fed. Appx. 278, 283 (4th Cir. 2007) (citing *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. 181, 186 (BIA 1977). 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 illicit trafficking of a controlled substance. The complaint states that on March 29, 2011, the petitioner and fourteen other individuals were arrested by Drug Enforcement Administration (DEA) agents at a residential property because they were identified as workers for an organization that grew marijuana plants at that residence and other locations. On appeal, the petitioner also acknowledges that marijuana plants were being grown in her residence with her knowledge. Based on the petitioner's own statements, the large quantity of marijuana discovered, the number of individuals involved in manufacturing the marijuana, and the fact that the petitioner was identified as a worker for the narcotics organization, the record contains reasonable, substantial, and probative evidence of the petitioner's involvement in drug-trafficking activity. The complaint, judgment and sentence, as well

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[2] Marijuana is a Schedule I drug under the Controlled Substances Act. *See* 21 U.S.C. § 812.

as the petitioner's guilty plea and her statements in these proceedings further support a determination that she falls within section 212(a)(2)(C)(i) of the Act, which precludes a finding of her good moral character under section 101(f)(3) of the Act.

In addition, the petitioner has been convicted of an aggravated felony. Section 101(a)(43)(B) of the Act, defines an aggravated felony as, in part: "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). " Section 924(c)(2) of Title 18 defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). Accordingly, an offense is a "drug trafficking crime" if it is punishable as a felony under the Controlled Substances Act. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006); *Toure v. Holder*, 460 Fed. Appx. 266, 267 (4th Cir. 2012). The petitioner's conviction is a felony violation of the Controlled Substances Act. *See* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A). Consequently, the petitioner's crime constitutes an aggravated felony under section 101(a)(43)(B) of the Act, which prevents a finding of her good moral character pursuant to section 101(f)(8) of the Act.

The petitioner has also not demonstrated that she is eligible for a discretionary determination of her good moral character despite her conviction pursuant to section 204(a)(1)(C) of the Act. There is no waiver of inadmissibility under section 212(a)(2)(C)(i) of the Act and her conviction is also not waivable as an aggravated felony.[3] Even if her offense was waivable, she has not demonstrated a connection to the abuse. The petitioner asserts in her January 6, 2013 statement that she had to leave her residence and employment in Virginia because her husband started threatening her after he was released from prison. She states that she moved to New York to reside with her brother and cousin. The petitioner recounts that she was arrested four months later because marijuana plants were being grown in the basement of their residence. In his November 21, 2012 letter submitted in response to the second RFE, the petitioner's criminal defense attorney asserted, "had [the petitioner] not felt the need to distance herself from her abusive husband as soon as possible, she would have been able to re-locate under less stressful circumstances and been less inclined to committing illegal acts. . . ." These two statements are insufficient to demonstrate a causal connection between her crime and the abuse. The record establishes that the petitioner's husband subjected her to battery and extreme cruelty and the petitioner has shown that her relocation to New York was because of her husband's abuse. She has not, however, shown a causal relationship between the abuse and her controlled substance offense. 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, subsections 101(f)(3) and (8) of the Act bar a finding of the petitioner's good moral character.

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[3] 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.

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 affidavit, dated May 21, 2010, the petitioner did not acknowledge her conviction or otherwise address her moral character. In response to the first RFE, the petitioner submitted a letter written in Spanish without a corresponding certified English translation. The petitioner was informed in the denial notice that she must submit a certified English translation of the document, but she failed to submit the translation on appeal. The AAO therefore cannot determine whether the evidence is probative and supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). In her January 6, 2013 letter, the petitioner briefly states that the owner of the house she was residing in was growing marijuana plants in the basement. The petitioner fails to acknowledge responsibility for her involvement in the offense. Nor does she discuss her subsequent rehabilitation. In response to the RFE, the petitioner submitted a letter from her criminal defense attorney who stated that the petitioner offered assistance to the prosecutors. Her criminal defense attorney also stated that the U.S. Attorney's Office for the Southern District of New York was expected to submit a letter to the court about her assistance. The petitioner, however, did not submit any letters from the U.S. Attorney's Office or other evidence of her cooperation and assistance that would favorably reflect on her good moral character. The judgment from the petitioner's conviction record shows that she was sentenced to a period of supervised release for two years. The petitioner, however, does not discuss whether she remains on supervised release, or provide evidence of her successful completion of probation. Her brief description of the events surrounding her offense also fails to establish that she was convicted under extenuating circumstances. The petitioner has not demonstrated responsibility for her actions and shown rehabilitation or otherwise established her good moral character despite her conviction.

The petitioner's drug conviction bars a finding of her good moral character pursuant to subsections 101(f)(3) and (8) of the Act. In addition, the petitioner committed an unlawful act which adversely reflects upon her 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

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 and the appeal will be dismissed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.