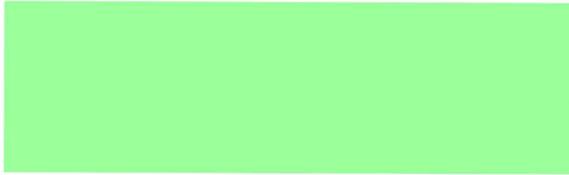


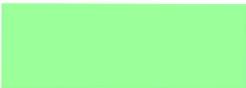


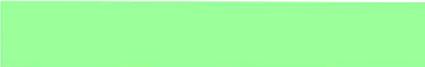
U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **APR 29 2014**

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:

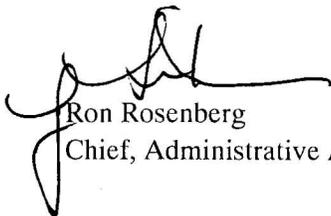
SELF-REPRESENTED

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--

...

(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;

...

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section);

....

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 Trinidad and Tobago who claims that she entered the United States on July 18, 1989 as a nonimmigrant visitor. The petitioner married K-V-, a U.S. citizen, on November 19, 2008 in Kew Gardens, New York.¹

The petitioner filed the instant Form I-360 on May 26, 2010. The director subsequently issued a Request for Evidence (RFE) and a Notice of Intent to Deny (NOID) of, among other things, the petitioner's good moral character. The petitioner 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 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 ground for denial and the appeal will be dismissed for the following reasons.

Good Moral Character

The petitioner's record of conviction reflects that on January 8, 1999, when she was 18 years old, she was arrested and charged with possessing with the intent to distribute cocaine, a Schedule II controlled substance, in violation of VA. Code Ann. §18.2-248. The petitioner pled guilty to the offense on April 28, 1999 in the Circuit Court of the City of [REDACTED]. The petitioner was granted a suspended sentence of five years and placed on supervised probation for a period of ten years with the conditions

¹ Name withheld to protect the individual's identity.

that she maintains good moral character, pays court costs and suspends her driving privileges for six months. The petitioner was released from supervised probation on March 27, 2003.

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 –

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
- (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 –

(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 possessing with the intent to distribute cocaine 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

² Cocaine is a Schedule II drug under the Controlled Substances Act. *See* 21 U.S.C. § 812.

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.” *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. *Id.* at 186. 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 Virginia Department of Criminal Justice Services forensic analysis of the evidence seized during the petitioner’s arrest reveals that she had, among other things, two (2) plastic bags containing a total of twenty-seven (27) plastic bag corners with cocaine, a ziplock bag containing fifty (50) ziplock bags with marijuana, and sixteen (16) empty ziplock bags. In her statements submitted below and on appeal, the petitioner acknowledges that she transported drugs from New York to Richmond, Virginia while in an abusive relationship with her former boyfriend. Based on the petitioner’s own statements and the type of evidence seized from the petitioner, the record contains reasonable, substantial, and probative evidence of the petitioner’s involvement in drug-trafficking activity. The complaint, judgment and sentence, as well 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). 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 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

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

connection to the abuse. In her statements submitted below, the petitioner explained that she and K-V began a relationship almost nine years after her conviction for possession with the intent to distribute cocaine. The record shows that the couple wed on April 23, 2009. There is no evidence of a causal relationship between the abuse in the couple's marriage and the petitioner's controlled substance offense from almost a decade earlier. 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.

On appeal, the petitioner asserts that she did not commit a crime and was instead a victim of kidnapping. She states that she did not serve any time in jail and qualifies for the Federal First Offender Act. She contends that she was not informed of the immigration consequences of her plea at the criminal hearing. She states that her conviction is more than three years old and she is a person of good moral character. The petitioner resubmits her conviction record and as additional evidence she submits an order from the Governor of Virginia, dated May 9, 2011, to restore her rights to vote, hold public office, serve on a jury and to be a notary public.

In her additional statements submitted on appeal, the petitioner reasserts that she was in a physically abusive relationship when she was in high school with a man who assaulted her and threatened her and her family with violence. She states that this man "kidnapped" her and forced her to travel with him from New York to Virginia to transport drugs. The petitioner further asserts that the lawyer who represented her in criminal proceedings did not inform her of her rights.

While the regulation at 8 C.F.R. § 204.2(c)(2)(v) requires evidence of the petitioner's good moral character during the three years preceding the filing of the petition, the regulation does not limit the temporal scope of U.S. Citizenship and Immigration Services' (USCIS') inquiry into the petitioner's moral character because section 204(a)(1)(A)(iii) of the Act does not prescribe a time period during which a self-petitioner's good moral character must be established. The director therefore correctly inquired into the petitioner's controlled substance offense.

The petitioner asserts that she is innocent of the crime. However, 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). Moreover, her assertion that she was not informed of the immigration consequences of her plea is not supported by evidence that it was, as a result, vacated due to a procedural defect in the criminal proceeding. Without evidence that the petitioner had her conviction vacated due to procedural or substantive defects in the criminal proceedings, she retains a conviction under section 101(a)(48)(A) of the Act for immigration purposes. *See Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006) (affirming this interpretation of conviction at section

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.

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 Ninth Circuit Court of Appeals has held that an alien whose offense would have qualified for treatment under the Federal First Offender Act (“FFOA”), but who was convicted and had his or her conviction expunged, may not be removed on account of that offense. See *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).⁴ FFOA treatment only applies to *simple* possession of a controlled substance. See *Cardenas-Uriate v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000). The rule set forth in *Lujan-Armendariz* regarding first-time simple possession of a controlled substance offense, is applicable only in the Ninth Circuit, and is a limited exception to the generally recognized rule that an expunged conviction qualifies as a “conviction” under the Act. The petitioner in this case is not under the jurisdiction of the Ninth Circuit. Even if she were under the Ninth Circuit, she would not qualify for FFOA treatment because her conviction was not expunged and she pled guilty to a drug trafficking offense - possession *with the intent to distribute* cocaine – a crime which is more serious than mere possession and outside the scope of FFOA.

The petitioner’s drug conviction bars a finding of her good moral character pursuant to subsections 101(f)(3) and (8) of the Act. 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.

⁴ In *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), the Ninth Circuit Court of Appeals overruled its holding in *Lujan-Armendariz*. Accordingly, an alien convicted of simple possession of a controlled substance in the Ninth Circuit whose conviction was expunged pursuant to a state rehabilitative statute is treated as “convicted” under the definition found in section 101(a)(48)(a) of the Act. 646 F.3d at 693. The Ninth Circuit held in *Nunez-Reyes*, however, that this rule would apply prospectively to all convictions rendered after July 14, 2011. *Id.* at 694.