



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF M-D-C-F-V-

DATE: DEC. 4, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-360, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT

The Petitioner seeks immigrant classification as an abused spouse of a U.S. citizen. *See* Immigration and Nationality Act (the Act) § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. APPLICABLE LAW

Section 204(a)(1)(A)(iii)(I) 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.

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J), 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].

In regards to determining a petitioner's good moral character, section 101(f) of the Act 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;

....

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. . . .

As referenced in section 101(f)(3) of the Act, section 212(a)(2)(A) of the Act, includes, “any alien convicted of . . . a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance” Section 212(a)(2)(A) of the Act, setting forth the criminal grounds of inadmissibility, provides, in pertinent part:

(i) In General

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

...

(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.

For self-petitioning abused spouses, section 204(a)(1)(C) of the Act provides the following exception:

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.

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

Matter of M-D-C-F-V-

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 standard and guidelines are explained further at 8 C.F.R. § 204.2(c)(2), which states, in pertinent parts, the following:

(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.

(ii) *Relationship.* A self-petition filed by a spouse must be accompanied by evidence of citizenship of the United States citizen It must also be accompanied by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages

II. PERTINENT FACTS AND PROCEDURAL HISTORY

The Petitioner, a citizen of Mexico, claims to have last entered the United States in 2004, without admission, inspection or parole. Pursuant to a Form I-862, Notice to Appear, issued July 3, 2013, the Petitioner was placed into removal proceedings, which remain pending. The Petitioner married her second spouse, L-P-¹, a U.S. citizen, on [REDACTED] 2011, in Washington. The Petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on September 30, 2013, based on her relationship with L-P-. The Director subsequently issued two requests for evidence (RFE) establishing, among other things, the Petitioner's qualifying relationship with L-P- and her good moral character. The Petitioner responded to the RFE with additional evidence, which the Director found insufficient to establish the Petitioner's eligibility. The Director denied the petition on the basis that the Petitioner had not established that she is a person of good moral character, and that she had not established a qualifying spousal relationship and her corresponding eligibility for immigrant classification. The Petitioner filed a timely appeal.

¹ Name withheld to protect the individual's identity.

Matter of M-D-C-F-V-

On appeal, the Petitioner submits a brief and evidence previously proffered below. We conduct appellate review on a *de novo* basis. Upon a full review of the record, as supplemented on appeal, the Petitioner has demonstrated a qualifying spousal relationship with her abusive spouse and corresponding eligibility for immigrant classification under section 201(b)(2)(A)(i) of the Act. However, the Petitioner has not overcome all the Director's grounds for denial, as she has not established that she is a person of good moral character. The appeal will be dismissed for the following reasons.

III. ANALYSIS

A. Qualifying Relationship and Corresponding Eligibility for Immigrant Classification

The Director erred in determining that the Petitioner did not establish a qualifying spousal relationship with a United States citizen, and consequently, that she also did not demonstrate her corresponding eligibility for immigrant classification under section 201(b)(2)(A)(i) of the Act. In response to the Director's second RFE, the Petitioner timely proffered the requested divorce decree reflecting that her marriage to her first spouse was terminated on [REDACTED] 2008. The Petitioner's subsequent marriage to her U.S. citizen spouse, L-P-, on [REDACTED] 2011, was therefore legally valid. However, the Director, in error, issued the decision in this matter one day prior to the timely receipt of the Petitioner's RFE response on the January 30, 2014, deadline indicated on the RFE. Upon our *de novo* review, the record demonstrates the Petitioner's legally valid marriage to her U.S. citizen spouse. The Petitioner has, therefore, established a qualifying spousal relationship with a United States citizen and the corresponding eligibility for immigrant classification based on that relationship, as required by subsections 204(a)(1)(A)(iii)(II)(aa)(AA),(cc) of the Act. The Director's determinations to the contrary are, hereby, withdrawn. Notwithstanding our determination here, however, the Petitioner remains ineligible as she has not established her good moral character.

B. Good Moral Character

The record indicates that on [REDACTED] 2009, the Petitioner was arrested and later charged with possession with intent to manufacture or deliver marijuana, possession of more than 40 grams of marijuana, and obstructing a law enforcement officer. The Petitioner later pled guilty to an amended criminal information and was convicted in the Superior Court of Washington for [REDACTED] on the reduced charge of possession of 40 grams or less of marijuana in violation of section 69.50.4014 of the Revised Code of Washington on [REDACTED], 2010. She was sentenced to a 90 day term of imprisonment of which 89 days were suspended for two years upon specified terms and conditions.

Upon review, the record supports the Director's determination that the Petitioner's conviction for possession of 40 grams or less of marijuana is a controlled substance violation, as described under section 212(a)(2)(A)(i)(II) of the Act, that statutorily bars a finding of the Petitioner's good moral character under section 101(f)(3) of the Act.

At the time of the Petitioner's conviction, Wash. Rev. Code § 69.50.4014 provided, in pertinent part, that "any person found guilty of possession of forty grams or less of marijuana is guilty of a

Matter of M-D-C-F-V-

misdemeanor.” Marijuana is a Schedule I drug under the Controlled Substances Act referenced in section 212(a)(2)(A)(i)(II) of the Act. *See* 21 U.S.C. § 812. The Petitioner’s conviction therefore categorically falls within the definition of a generic controlled substance offense that triggers inadmissibility, as described in section 212(a)(2)(A)(i)(II) of the Act. *See, e.g., Mellouli v. Lynch*, 135 S.Ct. 1980 (2015)(applying the categorical approach in determining whether the conviction was a controlled substance violation under the Act); *Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015)(same).

On appeal, the Petitioner contends that pursuant to 8 C.F.R. § 204.2(c)(2)(v), the period for assessing good moral character is the three years preceding the filing of the petition and that, according to its own guidance, U.S. Citizenship and Immigration Services (USCIS) is not required to look beyond the three-year period in considering a petitioner’s good moral character. Consequently, she maintains that her [REDACTED] 2010 conviction need not be considered in determining her good moral character, because it preceded the three-year period prior to the filing of the instant petition. Although the regulation at 8 C.F.R. § 204.2(c)(2)(v) only requires evidence of a petitioner’s good moral character during the three years preceding the filing of the petition, it does not actually limit the temporal scope of USCIS’ inquiry into a petitioner’s moral character, given that section 204(a)(1)(A)(iii) of the Act does not prescribe a time period during which a petitioner’s good moral character must be established. Additionally, while the statutory provisions for self-petitioning abused spouses have been amended several times since the publication of the interim rule at 8 C.F.R. § 204.2(c), a final rule has not yet been promulgated. Notably, none of the statutory amendments have changed the temporal scope of the good moral character requirement for self-petitioning abused spouses.

The Petitioner further asserts that her controlled substance violation does not statutorily bar a finding of her good moral character because pursuant to section 204(a)(1)(C) of the Act, her conviction is waivable for purposes of determining her inadmissibility under section 212(a) of the Act and it was connected to the battery and extreme cruelty her abusive spouse committed against her. Specifically, the Petitioner contends that she is eligible for a waiver of inadmissibility under section 212(h) of the Act, which is available for a single offense of simple possession for 30 grams or less of marijuana. She contends that the record of conviction does not indicate the amount of marijuana for which she was convicted and concedes that she bears the burden of proof to establish her eligibility for a waiver. The Petitioner, however, relying on *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), asserts that we are not permitted to look beyond the record of conviction to determine whether she possessed 30 grams or less of marijuana, and instead, may consider only whether the Washington statute of conviction under which she was convicted “categorically fits within the generic federal definition” of the corresponding generic offense under the Act at issue here. As Wash. Rev. Code § 69.50.4014 allows for a conviction where there is there is 40 grams or less of marijuana under the categorical approach, she maintains that the state statute is overly broad and the resulting ambiguity as to her eligibility for a waiver under the Act must be construed in her favor.

Our review of the record finds that the Petitioner has not demonstrated that her conviction is waivable and, consequently, she is not eligible for a discretionary determination of her good moral character. The Supreme Court in *Moncrieffe* recognized that the categorical approach is generally

utilized in determining whether a state offense is compared to an offense under the Act. *See* 133 S.Ct. at 1680-81 (holding that a state conviction for possession of marijuana with intent to distribute was not categorically a drug trafficking aggravated felony under the Act). Thus, as previously discussed, we apply the categorical approach articulated in *Moncrieffe* to determine whether the Petitioner's conviction falls within the controlled substance offense, as described in section 212(a)(2)(A)(i)(II) of the Act, which it does. Contrary to the Petitioner's assertion, however, the categorical approach does not apply to a determination of whether her controlled substance conviction relates to a single offense of simple possession for 30 grams or less of marijuana to establish her eligibility for a waiver under section 212(h) of the Act. The language in section 212(h), relating to simple possession of 30 grams or less of marijuana, is not part of the definition in the Act of a controlled substance offense, which would otherwise typically require the application of a categorical approach, but rather, it involves "very specific facts" about the underlying crime that calls for a "circumstance-specific" approach. *Matter of Dominquez-Rodriguez*, 26 I&N Dec. 408, 410-12 (BIA 2014) (holding that the phrase "single offense of simple possession of 30 grams or less of marijuana," creating an exception to a controlled substance ground of deportability under section 237(a)(2)(B)(i) of the Act, requires a circumstance-specific inquiry, notwithstanding *Moncrieffe*); *Matter of Espinoza*, 25 I&N Dec. 118, 124 (BIA 2009), *abrogated on other grounds by Mellouli v. Lynch*, 135 S.Ct. 1980 (2015) (finding that the language "single offense of simple possession of 30 grams or less of marijuana" in section 212(h) refers to specific unlawful acts, rather than to a generic crime, and thus, invites a circumstance-specific inquiry).

Accordingly, we apply here the circumstance-specific inquiry to determine whether the Petitioner's conviction involved possession of 30 grams or less of marijuana. As the Petitioner has conceded, she bears the burden of proof in these proceedings, *see* section 291 of the Act, and the record of conviction does not disclose the amount of the marijuana involved in her conviction. Additionally, the original criminal information indicates that she was initially charged with possession of over 40 grams of marijuana. Upon *de novo* review, the record does not establish that the Petitioner's marijuana conviction related to a simple possession of 30 grams or less. Consequently, she has not demonstrated that her conviction is waivable, and she is therefore not eligible for a discretionary determination of her good moral character despite her conviction pursuant to section 204(a)(1)(C) of the Act.

The Petitioner's controlled substance conviction bars a finding of her good moral character pursuant to subsection 101(f)(3) of the Act, and she has not shown that her conviction is waivable. She has therefore failed to demonstrate her good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

IV. CONCLUSION

On appeal, the Petitioner has established that she has a qualifying relationship as the spouse of a U.S. citizen and is eligible for immigrant classification based on that relationship. However, she has not established 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.

Matter of M-D-C-F-V-

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); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of M-D-C-F-V-*, ID# 14950 (AAO Dec. 4, 2015)