



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

MATTER OF J-R-R-R-

DATE: AUG. 12, 2016

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) section 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii). Under the Violence Against Women Act (VAWA), an abused spouse may self-petition as an immediate relative rather than remain with or rely upon an abuser to secure immigration benefits.

The Director, Vermont Service Center, denied the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (VAWA petition). The Director concluded that the Petitioner had not established that he is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief and additional evidence. The Petitioner claims that he has established that he is a person of good moral character.

Upon *de novo* review, we will dismiss the appeal.

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.

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

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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 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:

(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.

The burden of proof is on a petitioner to demonstrate eligibility by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). A petitioner may submit any evidence for us to consider; however, we determine, in our sole discretion, the credibility of and the weight to give that evidence. *See* section 204(a)(1)(J) of the Act; 8 C.F.R. § 204.2(c)(2)(i).

II. ANALYSIS

The Petitioner is a citizen of El Salvador who married L-R-,¹ a U.S. citizen, on [REDACTED] 2009. The Petitioner thereafter filed the instant VAWA petition based on his marriage to L-R-. Upon a full review of the record, as supplemented on appeal, the Petitioner has not overcome the Director's ground for denial.

¹ We provide the initials of individual names throughout this decision to protect identities.

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A. Good Moral Character

The Petitioner has not established that he is a person of good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. The record sets forth the Petitioner's criminal history as follows:

1. [REDACTED] 2002, arrest and subsequent conviction on [REDACTED] 2002, for petit larceny in violation of section 18.2-96 of the Virginia Code Annotated for which he was fined.
2. [REDACTED] 2012, arrest for driving while intoxicated, first offense. The charge was *nolle prosequi*.
3. [REDACTED] 2014, offense of driving on a suspended license in violation of Virginia Code Annotated sections 13.254/46.2.301. The Petitioner was convicted and sentenced to a 90-day suspended term of imprisonment, fines, and a 90-day suspension of his license.
4. [REDACTED] 2014, arrest and subsequent conviction on [REDACTED] 2015, for assault and battery on a family member in violation of section 18.2-57.2(A) of the Virginia Code Annotated. The record does not contain a certified court disposition for this arrest. The Virginia [REDACTED] criminal history record the Petitioner provided indicates that he was sentenced to a 12-month suspended term of imprisonment, but does not reflect whether the court imposed probation or other penalties. The warrant of arrest identifies the Petitioner's spouse, L-R-, as the victim.
5. [REDACTED] 2015, arrest on two counts of assault and battery on a family member under section 18.2-57.2(A) of the Virginia Code Annotated. The two warrants of arrest in the record name the Petitioner's minor sons, E-R- and J-R-, as the victims of the offense. According to the certified disposition in the record, the assault and battery charge relating to E-R- was *nolle prosequi*. The record does not contain a certified disposition for the remaining charge relating to J-R-, although the criminal history record the Petitioner submitted reflects a deferred adjudication until [REDACTED] 2016, on an amended charge of misdemeanor assault under section 18.2-57 of the Virginia Code Annotated and the imposition of supervised probation.

1. A Finding of the Petitioner's Good Moral Character Is Not Precluded Under Section 101(f)(8) of the Act

The implementing regulations at 8 C.F.R. § 204.2(c)(1)(vii) provide that a petitioner will be found to lack good moral character if he or she is a person described in section 101(f) of the Act. Subsection 101(f)(8) of the Act specifically bars a finding of good moral character if one has ever been convicted of an aggravated felony as defined under section 101(a)(43) of the Act.

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The Director below determined that the Petitioner's [REDACTED] 2015 conviction for assault and battery on a family member, for which he received a one year suspended sentence, constituted an aggravated felony pursuant to section 101(a)(43)(F) of the Act, as a "crime of violence (as defined in section 16 of title 18, United States Code) for which the term of imprisonment [is] at least one year." Consequently, the Director concluded that the conviction barred a finding of the Petitioner's good moral character under section 101(f)(8) of the Act.

We disagree and withdraw the Director's determination on this issue. The Board of Immigration Appeals (Board) has specifically held that assault and battery of a family member under section 18.2-57.2(A) is not categorically a crime of violence, as defined under 18 U.S.C. § 16(a). *Matter of Velasquez*, 25 I&N Dec. 278, 282 (BIA 2010) (further holding that the offense was also categorically not a crime of domestic violence under the Act but remanding for application of the modified categorical approach). A crime of violence for purposes of an aggravated felony determination under the Act is defined as an offense that has as an element "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 16(a).² Applying the U.S. Court of Appeals for the Fourth Circuit's (Fourth Circuit)³ definition of "physical force" as "violent" or "force capable of causing physical pain or injury to another person," the Board concluded that section 18.2-57.2(A) did not require such physical force for a conviction in all instances, and thus, did not categorically constitute a crime of violence. *Velasquez*, 25 I&N Dec. at 283 (citing *U.S. v. White*, 606 F.3d 144, 153 (4th Cir. 2010), which held that section 18.2-57.2 did not require "violent force" or "force capable of causing physical pain or injury to another person," and therefore, did not constitute a misdemeanor crime of domestic violence (MCDV))⁴; see also *U.S. v. Carthorne*, 726 F.3d 503, 513 (4th Cir. 2013) (holding that a similar offense of assault and battery of a police officer under section 18.2-57(C) of the Virginia Code Annotated was not categorically a crime of violence under the U.S. Sentencing Guidelines because the offense did not require "violent force" and did not satisfy the definition of crime of violence). Accordingly, we concur with the Petitioner's assertion on appeal that his conviction for assault and battery of a family member categorically⁵ does not constitute a crime of

² Subsection (b) of 18 U.S.C. § 16 defines crime of violence as "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." The Virginia misdemeanor offense here is only punishable by not more than one year imprisonment under state law and thus, cannot be classified as a felony under federal law and would not qualify as a crime of violence under 18 U.S.C. § 16(b). See *Velasquez*, 25 I&N Dec. at 280 (citing 18 U.S.C. §§ 3559(a)(5),(6)).

³ This matter falls within the jurisdiction of the Fourth Circuit.

⁴ Contrary to *White* (and in part, *Velasquez*), the U.S. Supreme Court later held that a state offense need not require as an element "violent force" to establish the "physical force" necessary for the state offense to qualify as a MCDV. *U.S. v. Castleman*, 134 S.Ct. 1405, 1410-13 (2014); see also *U.S. v. Vinson*, 805 F.3d 120, 124 (4th Cir. 2015) (acknowledging the abrogation of the holding in *White*). However, *Castleman* only alters the definition of "physical force" in the context of a MCDV determination, but leaves untouched the definition of "physical force" as "violent force" for purposes of a crime of violence determination. In addition, the separate findings in *White* and *Velasquez* that a conviction for assault and battery of a family member under section 18.2-57.2 did not require "violent force" or "force capable of causing physical pain or injury to another person," still remain intact. Thus, absent such violent force, the Virginia offense does not constitute a crime of violence. *Carthorne*, 726 F.3d at 513; *Velasquez*, 25 I&N Dec. at 282; see also *Castleman*, 134 S.Ct. at 1411, n.4 (noting that the Board in *Velasquez* had extended the requirement of violent force to the context of "crime of violence" under 18 U.S.C. § 16).

⁵ Although the Board in *Velasquez* remanded the matter there for consideration of whether section 18.2-57.2 of the

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violence and an aggravated felony under section 101(a)(43)(F) of the Act. Section 101(f)(8) of the Act, therefore, does not bar a finding of the Petitioner's good moral character and we withdraw the Director's decision to the contrary. However, notwithstanding our determination on this issue, the record does not establish the Petitioner's good moral character.

2. Petitioner Lacks Good Moral Character under Section 101(f) of the Act and the Regulation

The record demonstrates that the Petitioner lacks good moral character under the final paragraph of section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii). 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 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. . . .

As discussed, the Petitioner was convicted of assault and battery on L-R-, a family member, a misdemeanor, in violation of Virginia Code Annotated section 18.2-57.2(A) in [REDACTED] 2015. Although the criminal history record in the administrative file indicates that the Petitioner received a 12-month suspended sentence, the record does not contain a certified court disposition setting forth the sentence and/or other court imposed penalties and evidence showing the Petitioner's completion or satisfaction of any such penalties. The record further indicates that the Petitioner was again charged with assault and battery of a family member, namely his two minor sons, relating to an incident on [REDACTED] 2015. Although the Petitioner submitted a court certified warrant of arrest indicating that the assault and battery charge relating to one son was *nolle prosequi*, he did not do so for the second identical charge relating to his second son. Further, the Petitioner's Virginia [REDACTED] criminal history record indicates that an amended charge of assault and battery arising from the [REDACTED] 2015 arrest was deferred until [REDACTED] 2016, and that he received supervised probation. However, the Petitioner has not proffered evidence that he completed or satisfied the terms of his probation.

Virginia Code Annotated was a crime of violence (and a MCDV) under the modified categorical approach, we are satisfied that the offense is not divisible under subsequent case law. In the Fourth Circuit, the modified categorical approach is applicable only when an individual "was convicted of violating a divisible statute,[] and then only 'to determine which statutory phrase was the basis of the conviction.'" *Carthorne*, 726 F.3d at 511-12. Here, the Petitioner was convicted of subsection A of section 18.2-57.2, which provides that "[a]ny person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor." We, therefore, need not further engage in a modified categorical analysis.

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The Petitioner, in his written statements below, asserted that L-R- fabricated the assault and battery charges against him and that this is evidence of her psychological and emotional abuse against him. With respect to the [REDACTED] 2015 conviction, he stated that L-R- falsely told security at a bar that he was assaulting her when he attempted to take her home, knowing that L-R- had stopped taking her medication to treat her mental illness and was a danger to herself and others when she was drinking. Despite his claim that these charges were fabricated, and the fact that L-R- had previously been convicted of making false charges against him, the Petitioner indicated that he pled guilty upon the advice of his attorney who told him that he would go to jail, be deported, and would risk losing his children.

As to the [REDACTED] 2015 charges against him in [REDACTED] Virginia, involving his minor sons, apart from stating generally that L-R- had falsely obtained protective orders against him on behalf of their sons in another county based on a “false conviction for domestic assault and battery,” the Petitioner did not otherwise acknowledge the charges or whether they resulted in a conviction. He stated that his sons were placed in foster care after L-R- turned her sons into Child Protective Services because she was unable to care for them. Although the Petitioner is not permitted to see his children pursuant to the protective orders in place against him, he states that he is pursuing care and custody of them in court and completing required programs and parenting classes.

On appeal, the Petitioner asserts that he is a person of good moral character with a strong work ethic who has always provided for his mentally ill wife and his children, as well as his family in El Salvador. He proffers copies of letters of support submitted in his prior 2011 immigration court proceedings from L-R-, her grandfather and sister, and the Petitioner’s cousin, asserting his good character. The Petitioner contends that the Director’s reliance on his [REDACTED] 2015 conviction to find that he lacks good moral character was erroneous and reflected a “fundamental misunderstanding of the nature of domestic violence, and the causal relationship between the abuse L-R- perpetrated” against him. He further asserts that the Director erred in finding that the Petitioner was also an abuser in his marital relationship based on the conviction. The Petitioner maintains that there were extenuating circumstances for his conviction, which arose from false accusations by L-R- and was another example of the abuse she engaged in against him. He submits background materials and articles addressing circumstances under which individuals such as the Petitioner may plead guilty to crimes of which they are not guilty. However, despite the Petitioner’s assertions in these proceedings that he was not culpable for the criminal conduct, the fact remains that he pled guilty and was convicted for such conduct before a criminal tribunal. He does not indicate why, after his prior success in having L-R- convicted for making false claims against him, he did not challenge her claims in this matter. Regardless, we lack authority to look behind the Petitioner’s conviction to reassess his 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 guilt or innocence). Accordingly, insofar as the Petitioner relies on his claim that he lacks culpability for the criminal conduct to which he admits to having pled guilty, he has not satisfied his burden to establish extenuating circumstances for his conviction.

Moreover, as noted, the record does not contain a certified disposition for this conviction to determine the penalties imposed on the Petitioner by the court and the Petitioner’s compliance with

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or completion of such penalties. The Petitioner is also unable to establish his good moral character where he has not provided probative testimony on the [REDACTED] 2015 charges against him involving his children, including the specific allegations in the corresponding warrant of arrest that he was intoxicated when he came to see his sons and subsequently assaulted them. This is especially the case as the record does not contain a certified disposition on the charge relating to one of his sons, which appears to have resulted in a deferred adjudication on an amended charge of misdemeanor assault and supervised probation. If in fact the Petitioner was granted deferred adjudication, the record also does not indicate whether the Petitioner successfully completed his probation.

Lastly, the Petitioner cites to one of our decisions from April 2009 in which we found that the petitioner there had established her good moral character despite a prior “conviction” for assault and trespass. However, the cited decision is non-precedential and is not binding on us in this case. Further, contrary to the Petitioner’s assertion, the record did not establish in that case that the petitioner there had been convicted of assault against her spouse. Rather, the conviction record, which indicated that a battery charge had been dismissed and that the petitioner had been convicted of trespass, was unclear as to the disposition of the assault charge. Here, the Petitioner pled guilty to and was convicted of assaulting and battering his spouse and received a deferred adjudication for an assault involving his son.

Upon review of the record in totality, the Petitioner’s conviction for assault and battery against his spouse; the criminal charges of assault and battery against his minor sons; the lack of evidence in the record regarding the Petitioner’s probationary status in relation to the criminal assault charges involving his spouse and sons; and the existence of protective orders against him in favor of his sons, evidence behavior that falls below the standards of the average citizen in the community. He is therefore unable to establish his good moral character under the final paragraph of section 101(f) of the Act and pursuant to the regulation at 8 C.F.R. § 204.2(c)(1)(vii). The Petitioner has therefore not demonstrated his good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

III. CONCLUSION

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.

Cite as *Matter of J-R-R-R-*, ID# 17495 (AAO Aug. 12, 2016)