U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-B-R-

DATE: FEB. 10, 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 United States 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, revoked approval of the petition after properly notifying the Petitioner. The matter is now before us on appeal. The appeal will be dismissed.

I. APPLICABLE LAW

Section 205 of the Act, 8 U.S.C. § 1155, states the following:

> The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2(a) states, in pertinent part, the following:

> Any Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 [for automatic revocation] when the necessity for the revocation comes to the attention of [U.S. Citizenship and Immigration Services (USCIS)].

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.

In regards to determining a self-petitioner's moral character, section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C), provides:

> 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, 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].

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.

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)[].

II. PERTINENT FACTS AND PROCEDURAL HISTORY

The Petitioner, a citizen of the Philippines, last entered the United States on December 26, 2000, as a nonimmigrant visitor. She married R-R-[1], a U.S. citizen, on 2007, in California. On February 5, 2010, the Petitioner filed the instant Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, which was approved on July 27, 2010. Thereafter, the Director issued a notice of

[1] Name is withheld to protect the individual's identity.

intent to revoke (NOIR) approval of the Form I-360, and notified the Petitioner that the Form I-360 was granted in error, as a full review of the administrative record established that she had not demonstrated her good moral character because she had been convicted of a crime involving moral turpitude. The Petitioner timely responded to the NOIR. However, the Director found the response insufficient to overcome the proposed grounds for revocation, and thus, revoked approval of the Form I-360. The Petitioner timely filed a motion to reconsider. On motion, the Director reaffirmed the decision to revoke approval of the Form I-360.

The Petitioner filed a timely appeal of the Director's decision on her motion. On July 16, 2015, we issued a notice of intent to deny and request for evidence (NOID/RFE), notifying the Petitioner that her conviction also constituted an aggravated felony that statutorily barred a finding of her good moral character. Our NOID/RFE requested additional evidence to overcome our proposed grounds for dismissing the appeal and to establish the Petitioner's good moral character. On appeal, the Petitioner submits a brief, an updated personal statement, and additional evidence.

III. ANALYSIS

We review these matters on a *de novo* basis. Upon a full review of the record, as supplemented on appeal, the Petitioner has not overcome the Director's grounds for revocation. The appeal will be dismissed for the following reasons.

A. Good Moral Character

The record indicates that the Petitioner was convicted of carjacking in violation of section 215(a) of the California Penal Code on 2006, in the Superior Court of California, and sentenced to 365 days imprisonment and three years of probation.

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. The Director determined below that the Petitioner's conviction for carjacking constituted a crime involving moral turpitude that barred a finding of her good moral character pursuant to section 101(f)(3) of the Act. On appeal, the Petitioner contests the Director's determination and asserts that carjacking is categorically not a crime involving moral turpitude. We do not reach this issue here, as our *de novo* review of the record indicates that regardless of whether or not it is a crime involving moral turpitude, carjacking under Cal. Penal Code § 215(a) is an aggravated felony that statutorily bars a finding of the Petitioner's good moral character under section 101(f)(8) of the Act, which proscribes a finding of good moral character if an individual at any time has been convicted of an aggravated felony, as defined at section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43).

The U.S. Court of Appeals for the Ninth Circuit, in whose jurisdiction this matter falls, has held that carjacking, under the California statute at issue here, is categorically 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, but not including a purely political offense) for which the term of imprisonment [sic] at least one year." *Nieves-Medrano v. Holder*, 590 F.3d 1057, 1058 (9th Cir. 2010). The Petitioner was

convicted of carjacking under the same California statute and was sentenced to a term of imprisonment of 365 days or one year. Accordingly, her carjacking conviction constitutes an aggravated felony as defined under section 101(a)(43)(F) of the Act, as a crime of violence.

Additionally, carjacking under Cal. Penal Code § 215(a) is also an aggravated felony under 101(a)(43)(G) of the Act, as "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [sic] at least one year." Applying the three-step process articulated by the U.S. Supreme Court in *Descamps v. U.S.*, 133 S.Ct. 2276 (2013) and adopted by the Ninth Circuit in *Lopez-Valencia v. Lynch*, 798 F.3d 863 (9th Cir. 2015), we find that the Petitioner's conviction for carjacking falls squarely within the generic federal definition of, and is thus, categorically, a theft offense, as described in section 101(a)(43)(G) of the Act.[2] *See also Matter of V-Z-S-*, 22 I&N Dec. 1338, 1346 (BIA 2000) (finding that a taking of property constitutes a "theft" offense under section 101(a)(43)(G) of the Act, whenever there is "criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent").

On appeal, we afforded the Petitioner an opportunity to rebut our aggravated felony determination by issuing a NOID/RFE, as the Director's decision below did not specifically address this statutory bar to a finding of her good moral character. However, the Petitioner's response did not address our finding that she had been convicted of an aggravated felony, barring a finding of good moral character. Instead, the Petitioner asserts that she was pressured into accepting a guilty plea[3] and asks us to exercise our discretion and give her another chance to be an asset to America. However, we cannot look behind her conviction to reassess her guilt or innocence, and the Petitioner is statutorily barred from the relief she seeks. *See Matter of Roldan,* 22 I&N Dec. 512 (BIA 1999); *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). Consequently, she has not overcome the grounds for denial set forth in our NOID/RFE. Accordingly, the Petitioner's conviction for carjacking constitutes an aggravated felony, as a crime of violence and as a theft offense, precluding a finding of her good moral character pursuant to section 101(f)(8) of the Act. She is therefore statutorily barred from establishing her good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

---

[2] Under California law, a conviction for carjacking under section 215(a) of the Cal. Penal Code requires proof that: (1) the defendant took a vehicle that was not his or hers (2) from the immediate presence of a person who possessed the vehicle or was a passenger in the vehicle (3) against that person's will (4) by using force or fear and (5) with the intent of temporarily or permanently depriving the person of possession of the vehicle). *People v. Magallanes*, 173 Cal. App. 4th 529, 534, 92 Cal. Reptr. 3d 751, 754 (Cal. Ct. App. 2009). Similarly, the elements of a generic federal theft offense are: "[1] a taking of property or an exercise of control over property [2] without consent [3] with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Lopez-Valencia*, 798 F.3d at 868.

[3] We also note that the Petitioner's statements on appeal minimizing her involvement in the carjacking are contradicted by the police reports she submitted. For example, though the Petitioner claims in her statement on appeal that she did not call the victims of the carjacking, the [redacted] Police Department Offense Report indicates that the Petitioner admitted to calling the victims from a pay telephone and leaving them a message. The same Offense Report also indicates that the Petitioner was aware that her co-conspirators had a gun and that something was going to happen to the victims.

IV. CONCLUSION

On appeal, the Petitioner has not overcome the Director's grounds for revocation, as she has not established her good moral character. She is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

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 C-B-R-*, ID# 14565 (AAO Feb. 10, 2016)