



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

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

MATTER OF E-D-S-

DATE: JAN. 4, 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 child of a United States citizen. *See* Immigration and Nationality Act (the Act) § 204(a)(1)(A)(iv), 8 U.S.C. § 1154(a)(1)(A)(iv). 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 101(b)(1) of the Act defines a child as, in pertinent part:

an unmarried person under 21 years of age who is . . . (E)(i) a child adopted while under the age of sixteen years. . .[.]

Section 204(a)(1)(A)(iv) of the Act provides:

An alien who is the child of a citizen of the United States, or who was a child of a United States citizen parent who within the past two years lost or renounced citizenship status related to an incident of domestic violence, and who is a person of good moral character, who is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i), and who resides, or has resided in the past, with the citizen parent may file a petition with the [Secretary of Homeland Security] under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the [Secretary] that the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's citizen parent. For purposes of this clause, residence includes any period of visitation.

Section 204(a)(1)(D)(v) of the Act states:

For purposes of this paragraph, an individual who is not less than 21 years of age, who qualified to file a petition under subparagraph (A)(iv) or (B)(iii) as of the day before the date on which the individual attained 21 years of age, and who did not file such a petition before such day, shall be treated as having filed a petition under such subparagraph as of such day if a petition is filed for the status described in such subparagraph before the individual attains 25

years of age and the individual shows that the abuse was at least one central reason for the filing delay. . . .

The eligibility requirements are explained further at 8 C.F.R. § 204.2(e)(1), which states, in pertinent part, the following:

(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 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.

. . . .

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 212(a)(2) 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))

. . . .

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. . . .

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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 acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), 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].

II. PERTINENT FACTS AND PROCEDURAL HISTORY

The Petitioner, a citizen of Mexico, was born on [REDACTED]. He was admitted to the United States on August 1, 1997, as a nonimmigrant visitor. The record indicates that prior to his admission, the Petitioner was adopted by his father, D-S-,¹ a citizen of the United States, at the age of [REDACTED] in Mexico in 1998. A Form I-862, Notice to Appear, was issued to the Petitioner on April 23, 2013, placing him into removal proceedings, which remain pending.

The Petitioner filed the instant Form I-360 on September 12, 2013, when he was [REDACTED] years old, based on his relationship with his adoptive father, D-S-. The Director found the Petitioner's evidence insufficient to establish his eligibility and denied the petition, finding that the Petitioner had not established a qualifying parent-child relationship with a U.S. citizen and corresponding eligibility for immigrant classification under section 201(b)(2)(A)(i) of the Act. The Director further held that the Petitioner had not established that he was a person of good moral character. The Petitioner appealed the Director's decision. On appeal, the Petitioner submits supporting briefs from his counsel of record and previously submitted evidence.

We conduct appellate review on a *de novo* basis. Upon a full review of the record, the Petitioner has not overcome the Director's grounds for denial. The appeal will be dismissed for the following reasons.

¹ Name withheld to protect individual's identity.

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III. ANALYSIS

A. Qualifying Relationship and Corresponding Eligibility for Immigrant Classification

We find no error in the Director's determination that the Petitioner did not establish the requisite qualifying relationship as the child of an abusive U.S. citizen. *See* Section 204(a)(1)(A)(iv) of the Act; *see also* 8 C.F.R. § 204.2(e)(1)(i). The late-filing provision at section 204(a)(1)(D)(v) of the Act allows individuals, who no longer satisfy the definition of the term "child" under the Act due to having attained 21 years of age, to still qualify as a "child" for purposes of section 204(a)(1)(A)(iv) eligibility, if they file before they reach the age of 25 years and show that the abuse was at least one central reason for the delay in filing. Here, the record demonstrates that the Petitioner was already [REDACTED] years old at the time he filed the Form I-360, and thus, did not fall within the parameters of the exception at section 204(a)(1)(D)(v) of the Act.

On appeal, the Petitioner asserts that the Director erred in calculating his age in these proceedings as of the date of the filing of the Form I-360. He contends that he still qualifies as a "child" for purposes of this petition, because pursuant to the Child Status Protection Act (CSPA), as codified at section 201(f) of the Act,² his age was "frozen" at age [REDACTED] the age he was when his abusive adoptive father filed a Form I-130, Petition for Alien Relative, on his behalf to classify him as an immediate relative child of a U.S. citizen. As the Petitioner correctly notes, the age-out protections afforded to immediate relative children of U.S. citizens under section 2 of the CSPA also extend to children self-petitioning under section 204(a)(1)(A)(iv) of the Act.³ However, contrary to the Petitioner's assertions, section 2 of the CSPA applies in these proceedings to freeze the age of a child self-petitioner as of the filing of the Form I-360.⁴ The Petitioner does not provide, and we are unaware of, any legal precedent or other binding authority for his assertion that under the CSPA he retains the date of a previous Form I-130 filed on his behalf for purposes of his subsequent Form I-360 filed under section 204(a)(1)(A)(iv) of the Act. Accordingly, the Petitioner has not established the requisite qualifying relationship as the child of an abusive U.S. citizen and his corresponding eligibility for immediate relative classification under section 201(b)(2)(A)(i) of the Act, as required by section 204(a)(1)(A)(iv) of the Act.

² Section 201(f) of the Act allows the child beneficiary of an immediate relative visa petition to retain his or her age as of the date of the filing of that visa petition.

³ Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 70/6.1.1, *Age-Out Protections Afforded Battered Children Pursuant to The Child Status Protection Act and the Victims of Trafficking and Violence Protection Act 1-2* (Aug. 17, 2004), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/cspavtvp081704.pdf.

⁴ *See id.*

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B. Good Moral Character

1. The Petitioner's Criminal History

The record indicates that the Petitioner has several convictions. On [REDACTED] 2004, the Petitioner was convicted of petty theft in violation of Cal. Penal Code § 484(a) and was fined and sentenced to two days. On [REDACTED] 2004, he was again convicted of petty theft (after prior theft convictions) in violation of Cal. Penal Code § 666 and was sentenced to 180 days imprisonment and three years of probation. Thereafter, the Petitioner was convicted on [REDACTED] 2006, of unlawful carrying and possession of weapons (concealed dirk or dagger) in violation of Cal. Penal Code § 12020(a)(4) and was sentenced to 270 days imprisonment and three years of probation. Lastly, on [REDACTED] 2011, the Petitioner was convicted of robbery in the second degree in violation of Cal. Penal Code § 211 and was sentenced to two years imprisonment.

2. A Finding of the Petitioner's Good Moral Character Is Precluded Under Sections 101(f)(3) and 101(f)(8) of the Act

The implementing regulations at 8 C.F.R. § 204.2(e)(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. Section 101(f)(3) of the Act proscribes a finding of good moral character if an individual is a member of one or more of the classes of persons, whether inadmissible or not, described in section 212(a)(2)(A) of the Act as having been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude or an attempt or conspiracy to commit such a crime. Similarly, section 101(f)(8) of the Act bars a finding of good moral character if an individual has ever been convicted of an aggravated felony as defined under section 101(a)(43) of the Act.

The U.S. Court of Appeals for the Ninth Circuit, in whose jurisdiction this matter falls, has held that second degree robbery under Cal. Penal Code § 211, the statute under which the Petitioner was convicted, is a crime involving moral turpitude. *See Mendoza v. Holder*, 623 F.3d 1299, 1304 (9th Cir. 2010). Likewise, the Petitioner's two convictions for petty theft also constitute crimes involving moral turpitude. *See Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009) (petty theft under Cal. Penal Code § 484/488 is a crime involving moral turpitude). Consequently, the Petitioner's convictions bar a finding of his good moral character under section 101(f)(3) of the Act.

Additionally, the Ninth Circuit has also found that robbery under Cal. Penal Code § 211 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) for which the term of imprisonment [is] at least one year." *U.S. v. McDougherty*, 920 F.2d 569, 573-74 (9th Cir. 1990) (robbery under California law is categorically a crime of violence as that term is defined under 18 U.S.C. § 16); *see generally U.S. v. Prince*, 772 F.3d 1173, 1176 (9th Cir. 2014) (relying on *McDougherty* to conclude that attempted robbery under California law was a "violent felony" under the residual clause of the Armed Career Criminal Act). The Petitioner here was sentenced to a term of imprisonment of two years for his

conviction under Cal. Penal Code § 211. Thus, his robbery conviction is also an aggravated felony as a crime of violence under section 101(a)(43)(F) of the Act.

Accordingly, as the Petitioner has been convicted of crimes involving moral turpitude and an aggravated felony, sections 101(f)(3) and (8) of the Act preclude a finding of his good moral character, as required by section 204(a)(1)(A)(iv) of the Act.

On appeal, the Petitioner contests the Director's determination that he lacks good moral character and asserts that, pursuant to section 204(a)(1)(C) of the Act, his convictions do not bar a finding of his good moral character because they are waivable and were connected to his adoptive father's battery or extreme cruelty. However, the Petitioner is not eligible for a discretionary determination of his good moral character, because his robbery conviction renders him deportable under section 237(a)(2)(A)(iii) for having been convicted of an aggravated felony, which is not waivable, as required under section 204(a)(1)(C) of the Act. Section 237(a)(2)(A)(vi) of the Act provides a waiver of deportability but only 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. U.S. 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.⁵ Consequently, as the Petitioner's aggravated felony conviction is not waivable, he is not eligible for a discretionary determination of his good moral character under section 204(a)(1)(C) of the Act.⁶

In sum, the Petitioner has been convicted of crimes involving moral turpitude and an aggravated felony, thereby precluding a finding of his good moral character under sections 101(f)(3) and (8) of the Act. He is therefore statutorily barred from establishing his good moral character, as required by section 204(a)(1)(A)(iv) of the Act.

IV. CONCLUSION

On appeal, the Petitioner has not overcome the Director's grounds for denial, as he has not established a qualifying relationship as a child of a U.S. citizen and his corresponding eligibility for immediate relative classification based on such a relationship. He has also not demonstrated that he is a person of good moral character. The Petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iv) of the Act.

⁵ Although certain criminal convictions may be waived, there is no corresponding waiver for a conviction of an aggravated felony. See Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQOPRD 70/8.1/8.2, *Determinations of Good Moral Character in VAWA-Based Self-Petitions* Attachment 1 (Jan. 19, 2005), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/gmc_011905.pdf.

⁶ The Petitioner asserts that the matter should be remanded given that the Director's decision did not set forth any analysis to support the determination. The Director's decision did, however, place the Petitioner on notice that the record below did not establish his good moral character, and he had adequate opportunity to present additional evidence and arguments on appeal. Accordingly, we will review and consider this issue here under our *de novo* authority.

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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 E-D-S-*, ID# 15125 (AAO Jan. 4, 2016)