



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

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

MATTER OF D-J-R-O-

DATE: MAR. 16, 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) § 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) of the Act provides that an alien who is the spouse of a U.S. citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the U.S. 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).

The evidentiary requirements and our review of that evidence is set forth in section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J), which states in pertinent part:

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 of Homeland Security].

The eligibility requirements relating to good moral character are set forth 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 . . . 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. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

Section 101(f) of the Act, 8 U.S.C. § 1101(f), defining the term "good moral character," states, in pertinent part:

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 . . . subparagraph (A) [relating to crimes involving moral turpitude] . . .

....

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection [101](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. . . .

As referenced in section 101(f)(8) of the Act, section 101(a)(43)(M)(i) of the Act in turn defines the term "aggravated felony" to include an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000. . . ."

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The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further set forth 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. . . . 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.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

The Petitioner is a citizen of Honduras who claims to have last entered the United States on February 16, 2004, without inspection, admission or parole. She married her spouse, a U.S. citizen, on [REDACTED] 2013, in Florida. The Petitioner filed the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on November 25, 2014, seeking immediate relative status as the abused spouse of a U.S. citizen. The Director issued a request for evidence (RFE), in part, of her criminal history, and any discretionary factors to support a waiver of grounds of inadmissibility or a finding that the Petitioner is a person of good moral character. The Petitioner timely responded with additional evidence that the Director found insufficient to establish the Petitioner's eligibility. The Director denied the petition based on her determination that the Petitioner was convicted of both an aggravated felony and a crime involving moral turpitude (CIMT) and was, therefore, not a person of good moral character. She further determined that the Petitioner did not merit a favorable exercise of discretion. The Petitioner timely filed an appeal.

III. ANALYSIS

We review these proceedings *de novo*. On appeal, the Petitioner submits a brief and asserts that her conviction does not preclude her from establishing her good moral character. After a full review of the record, as supplemented on appeal, we conclude that the Petitioner has not established her eligibility as the self-petitioning spouse of an abusive U.S. citizen under section 204(a)(1)(A)(iii) of the Act. We will dismiss the appeal for the following reasons.

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A. Good Moral Character

Primary evidence of a petitioner's good moral character is his or her affidavit, which should be accompanied by local police clearances or state-issued criminal background checks from each of the petitioner's residences during the three years before the petition was filed. 8 C.F.R. § 204.2(c)(2)(v). The record shows that the Petitioner was convicted of the following criminal offenses:

- 1) On [REDACTED] 2014, the [REDACTED] Florida [REDACTED] Circuit Court withheld adjudication, pursuant to the Petitioner's plea of *nolo contendere*,¹ of workers' compensation fraud, a second degree felony, in violation of Fla. Stat. Ann. section 440.105(4)(B)(5) and sentenced her to one day in jail, three years of supervised probation, and payment of restitution totaling \$18,783.00.²
- 2) On [REDACTED] 2012, the County Court of [REDACTED] Florida convicted the Petitioner, pursuant to her plea of *nolo contendere*, of no driver license – never had one (second offense), a second degree misdemeanor, in violation of Fla. Stat. Ann. section 322.03(1), and attaching tag not assigned, a second degree misdemeanor, in violation of Fla. Stat. Ann. section 322.261, and sentenced her to three weekend work programs, 29 days of jail (suspended), and payment of costs and fees.³

The Petitioner addressed her moral character in an undated declaration submitted to United States Citizenship and Immigration Services (USCIS) in response to the Director's RFE. With respect to the driving violation and placement of an unassigned tag, she took responsibility for her actions and stated that "necessity was the reason for the bad judgment call." Regarding the workers' compensation fraud, she indicated that she ignorantly followed advice of bad people, and she was remorseful for her actions. She stated that she came to the United States very young, was neglected, had an abusive husband, and is a good person. She has three U.S. citizen children and has served as the guardian for her sister's young children. She submits letters from professional and personal associates, her church pastor, family members, and friends attesting to her good moral character. She submits evidence that her children are in school and she filed taxes in 2007.

The Petitioner did not submit a local police clearance or a state-issued criminal background check from each place she resided for six or more months during the three years preceding the filing of her Form I-360, nor did she explain her failure to do so. Consequently, the Petitioner has not submitted primary evidence of her good moral character as required by 8 C.F.R. § 204.2(c)(2)(v). We also conclude that the Petitioner's 2014 conviction for workers' compensation fraud is an aggravated felony, which precludes a finding of her good moral character as a matter of law under section

¹ Withholding of adjudication pursuant to a plea of *nolo contendere* constitutes a conviction for immigration purposes. See section 101(a)(48)(A) of the Act; see also *United States v. Anderson*, 328 F.3d 1326, 1328 (11th Cir. 2003).

² Case number [REDACTED]

³ Case number [REDACTED]

101(f)(8) of the Act. As such, we will not examine the Petitioner's argument that she is entitled to a waiver of inadmissibility and a discretionary finding that she is a person of good moral character.

The Director determined that the Petitioner's conviction of workers' compensation fraud was an aggravated felony, which precludes a finding of her good moral character as a matter of law under section 101(f)(8) of the Act. At the time of her conviction in 2014, Fla. Stat. Ann. section 440.105 provided, in part, that:

(4) Whoever violates any provision of this subsection commits insurance fraud, punishable as provided in paragraph (f).

....

(b) It shall be unlawful for any person:

....

5. To knowingly make any false, fraudulent, or misleading oral or written statement, or to knowingly omit or conceal material information, required by s. 440.185 or s. 440.381, for the purpose of obtaining workers' compensation coverage or for the purpose of avoiding, delaying, or diminishing the amount of payment of any workers' compensation premiums.

....

(f) If the monetary value of any violation of this subsection:

....

2. Is \$20,000 or more, but less than \$100,000, the offender commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Whether a conviction constitutes an aggravated felony under section 101(a)(43)(M)(i) of the Act requires a two-part analysis. First, we employ a categorical approach looking at the statute of conviction. See *Walker v. U.S. Attorney General*, 783 F.3d 1226 (11th Cir. 2015) (*en banc*). In *Walker*, the court looked first to the generic definition of aggravated felony, which requires proof of fraud or deceit. The court determined that the Florida statute at issue in the case, Fla. Stat. Ann. section 831.02,⁴ was categorically a crime of deceit, in that it required deceit as an element of the

⁴ Fla. Stat. Ann. section 831.02 (West 2016) provides: "[w]hoever utters and publishes as true a false, forged or altered record, deed, instrument or other writing . . . knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person, shall be guilty of a felony of the third degree."

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offense. The reason for the deceit was not relevant to the determination. Second, to determine whether the loss to the victim(s) exceeded \$10,000, we are not limited to the statute of conviction, but look to the particular circumstances in which a petitioner committed the fraud or deceit crime on a specific occasion. *See Nijhawan v. Holder*, 129 S.Ct. 2294, 2300-01 (2009) (conviction for conspiracy to commit money laundering and mail, wire and bank fraud was an aggravated felony under section 101(a)(43)(M)(i) of the Act because the defendant stipulated that the victims' loss exceeded \$100 million).

Under the first step of this analysis, the statute of the Petitioner's conviction contains the elements of fraud or deceit, in that the statute requires the knowing making of a false, fraudulent, or misleading statement, or the knowing omission or concealment of material information in order to obtain a benefit. Thus, the Florida statute is categorically a crime of fraud or deceit, because no action punishable under the statute would involve action that is not deceitful.

Having established that the Petitioner's crime involved fraud or deceit, we next examine the specific circumstances surrounding the Petitioner's offense to determine whether the loss to the victim exceeded \$10,000 such that her conviction is an aggravated felony under section 101(a)(43)(M)(i) of the Act. *Nijhawan v. Holder*, 557 U.S. at 40. In criminal cases, restitution may compensate victims only for losses directly and proximately caused by a defendant's criminal conduct. *See United States v. Robertson*, 493 F.3d 1322, 1334 (11th Cir. 2007). A court's restitution order is properly considered when determining whether the victim's loss exceeded \$10,000 under section 101(a)(43)(M)(i) of the Act. *See Nijhawan v. Holder*, 557 U.S. at 32, 42-43 (\$683 million in restitution to victims). In the instant case, the court ordered the Petitioner to pay \$18,783 in restitution.

The Petitioner asserts on appeal that the record of conviction does not contain evidence that the loss exceeded \$10,000, and cites *In Re Babaisakov*, 24 I. & N. Dec. 306 (BIA) in support of her argument that as she did not plead to a specific loss amount, she cannot be determined to be an aggravated felon under the Act. Contrary to the Petitioner's assertion, the record of conviction indicates in Count One of the Information dated [REDACTED] 2011, that the Petitioner was convicted under Fla. Stat. Ann. section 440.105(4)(f)(2) for fraud involving a monetary amount of more than \$20,000.

The Petitioner further asserts that as the burden of proof in a restitution hearing is preponderance of the evidence, any finding that the loss exceeded \$10,000 would not meet the clear and convincing standard in removal proceedings. While the legal basis for the Petitioner's argument is not clear, we are not considering her case in removal proceedings, and in the current proceedings she has the burden of proving her eligibility for the benefit. *See* section 291 of the Act. Moreover, the criminal court found that there was a factual basis for her plea, *see Maselli v. Florida*, 446 So. 2d 1079, 1080, and we cannot look behind the conviction.⁵ *See Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1034 (BIA 1999); *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996).

⁵ As shown in the record of conviction, the Petitioner voluntarily pled *nolo contendere* to fraud involving a monetary

Accordingly, the record establishes that the loss to the victim of the Petitioner's offense exceeded \$10,000. In sum, the record shows that the Petitioner was convicted of an offense that involved fraud or deceit in which the loss to the victim exceeded \$10,000, and is an aggravated felony as defined in section 101(a)(43)(M)(i) of the Act. The Petitioner's conviction of an aggravated felony bars a finding of her good moral character pursuant to section 101(f)(8) of the Act.

The Director also determined that the Petitioner's conviction is a CIMT, which was not connected to her former spouse's abuse, and consequently barred a finding of her good moral character under section 101(f)(3) of the Act. On appeal, the Petitioner claims that her fraud conviction is not a CIMT. As an aggravated felony, the Petitioner's 2014 conviction bars a finding of her good moral character regardless of whether or not the offense was a CIMT or was connected to her former spouse's battery or extreme cruelty. A petitioner may be found to have good moral character despite an act or conviction that would otherwise bar such a finding under section 101(f) of the Act if: 1) the act or conviction is waivable for the purposes of determining admissibility or deportability under section 212(a) or section 237(a) of the Act; and 2) USCIS determines that the act or conviction was connected to having been battered or subjected to extreme cruelty. Section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C).

We will not consider whether the Petitioner was convicted of a CIMT or whether the conviction is waivable because, although a CIMT is waivable for self-petitioners under section 212(h)(1)(C) of the Act, an aggravated felony is not. Section 237(a)(2)(A)(vi) of the Act, 8 U.S.C. § 1227(a)(2)(A)(vi), only provides a deportability waiver for persons 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. USCIS does not have the authority to grant such a pardon and the record does not indicate that the Petitioner received such a pardon. Accordingly, 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. The Petitioner's conviction for an aggravated felony cannot be waived and the exception at section 204(a)(1)(C) of the Act does not apply to her. Consequently, in this decision we do not reach the issue of whether or not her conviction also constituted a CIMT and was connected to her former spouse's abuse.

IV. CONCLUSION

The Petitioner has not established her good moral character. The Petitioner was convicted of an aggravated felony as described at section 101(a)(43)(M)(i) of the Act, which bars a finding of her good moral character under section 101(f)(8) of the Act and the regulations at 8 C.F.R. §§ 204.2(c)(1)(vii), (c)(2)(v). Therefore, the Petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

In these proceedings, the Petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden. Accordingly, the appeal is dismissed.

amount of more than \$20,000.

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ORDER: The appeal is dismissed.

Cite as *Matter of D-J-R-O-*, ID# 16063 (AAO Mar. 16, 2016)