



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

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

MATTER OF G-N-F-

DATE: MAY 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 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 petition. The Director concluded that the Petitioner had not established that his spouse subjected him to battery or extreme cruelty and he is a person of good moral character.

The matter is now before us on appeal. On appeal, the Petitioner submits additional evidence. The Petitioner claims that the Director did not properly analyze or consider the evidence in the record of proceedings.

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 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.

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 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)(1), which provides, in pertinent part:

(vi) *Battery or extreme cruelty.* For the purpose of this chapter, the phrase “was battered by or was the subject of extreme cruelty” includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . spouse, must have been perpetrated against the self-petitioner or the self-petitioner’s child, and must have taken place during the self-petitioner’s marriage to the abuser.

(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:

(iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women’s

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shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

(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.

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 (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. RELEVANT FACTS AND PROCEDURAL HISTORY

The Petitioner, a citizen of Jamaica, married K-G-,¹ a United States citizen, on [REDACTED] 2013, in [REDACTED] New York, and filed a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, a few months later on [REDACTED] 2013. The Director subsequently issued a request for evidence (RFE) based on a lack of evidence that the Petitioner entered into marriage with K-G- in good faith, jointly resided with K-G- during their marriage, was battered or suffered extreme cruelty by K-G-, and is a person of good moral character. The Petitioner responded to the RFE with additional evidence and the Director found the evidence insufficient to establish his eligibility as an abused spouse of a U.S. citizen. The Director denied the Form I-360 and the Petitioner appealed. On appeal, the Petitioner submits additional evidence.

III. ANALYSIS

A. Battery or Extreme Cruelty

The relevant evidence in the record of proceedings does not establish that the Petitioner was subjected to battery or extreme cruelty by his spouse during their marriage.

¹ Name withheld to protect the individual's identity.

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In his personal statement submitted in response to the RFE, the Petitioner states that he and his spouse argue, she does not want him to spend time with his friends because she believes he may be cheating on her again, she speaks to him in a demeaning manner, and she threatens to inform U.S. Immigration and Customs Enforcement (ICE) of his lack of immigration status. He contends that the “constant bickering” with his spouse causes him to have migraines, which he treats with two Excedrin caplets each day. The Petitioner also notes that he and K-G- are in counseling and that, although this is a rough time in their marriage, they love each other and he wants to spend the rest of his life with her. With this appeal, the Petitioner submits another personal statement, in which he explains that the frequent arguing with his spouse is bad but it is her threats to have him deported that stresses him out and causes the migraines.

The Petitioner’s personal statements only generally describe the claimed emotional abuse by K-G-, and do not describe any particular incident of abuse in detail to demonstrate that K-G- battered him, or that her behavior involved acts of or threatened acts of violence, psychological or sexual abuse, or otherwise constituted extreme cruelty, as that term is defined at 8 C.F.R. § 204.2(c)(1)(vi).

In response to the RFE, the Petitioner submitted a letter from [REDACTED] Ph.D., C.S.W., M.F.T., in which he indicates that the Petitioner and K-G- engaged in family and marital therapy. [REDACTED] also reports that the couple has “learned to place effort and energy into improving their marriage and can now see the positive results of wellness in a committed relationship.” [REDACTED] does not, however, provide any information regarding any incidents of abuse or extreme cruelty directed at the Petitioner by K-G-. With this appeal, the Petitioner submits a letter from [REDACTED] LCSW, ACSW, CASAC, in which she relates that the Petitioner reported to her that he felt his spouse was verbally abusive and threatened to have him deported. She also states that the Petitioner and K-G- attended therapy with [REDACTED] but she does not disclose whether the Petitioner received any services from her or whether she has any connection with [REDACTED]

The Petitioner also provided photographs in response to the RFE of his medicine cabinet, which contains a bottle of Excedrin. These photographs only show that the Petitioner keeps Excedrin caplets in his home. Even if the Petitioner takes Excedrin for migraines resulting from arguments with K-G-, when viewed in its totality, the evidence in the record of proceedings does not demonstrate that K-G-’s behavior involved “any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. . . .” *See* 8 C.F.R. § 204.2(c)(2)(vi). Consequently, the Petitioner has not established that K-G- subjected him to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

B. Good Moral Character

Although the regulation at 8 C.F.R. § 204.2(c)(2)(v) states that local police clearances or background checks must cover the three-year period preceding the filing of the Form I-360, U.S. Citizenship and Immigration Services (USCIS) is not limited to this three-year period when assessing a petitioner’s

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good moral character.² According to the preamble to the VAWA rule at page 13066, the specification of a three-year period at 8 C.F.R. § 204.2(c)(2)(v) “does not preclude the Service from choosing to examine the self-petitioner’s conduct and acts prior to that period . . . if there is reason to believe that the self-petitioner may not have been a person of good moral character *in the past* (emphasis added).”³ In response to the RFE, the Petitioner provided a criminal history prepared by the Federal Bureau of Investigation at his request, which indicates several arrests and convictions for marijuana-related offenses prior to the three-year period preceding his filing of a Form I-360. Accordingly, we examine the Petitioner’s conduct and acts prior to that three-year period because there is reason to believe that he may not have been a person of good moral character.

The criminal history provided by the Petitioner indicates the following arrests and convictions:

- On or about [REDACTED] 2000, the Petitioner was arrested for possession and sale of marijuana and use of drug paraphernalia and he was subsequently convicted for the criminal sale of marijuana in the second degree, in violation of N.Y. Penal Law § 221.50 (McKinney 2000), for which he received [REDACTED] of probation.
- On [REDACTED] 2005, the Petitioner was arrested for possession of marijuana in the fourth degree, in violation of N.Y. Penal Law § 221.15 (McKinney 2005), for which he was convicted and sentenced to [REDACTED] of community service.
- On [REDACTED] 2006, the Petitioner was arrested for possession of more than 16 ounces of marijuana, as well as possession of more than 25 grams of marijuana, and was convicted in 2007 of possession of marijuana in the fifth degree, in violation of N.Y. Penal Law § 221.10 (McKinney 2006), and sentenced to [REDACTED] of community service.

The Petitioner’s conviction for the sale of marijuana in the second degree in 2000 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. 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. Pursuant to section 221.50 of the New York Penal Law, a person is guilty of the criminal sale of marijuana in the second degree if he “knowingly and unlawfully sells one or more preparations, compounds, mixtures or substances containing marihuana . . . [which are] of an aggregate weight of more than four ounces, or knowingly and unlawfully sells one or more preparations, compounds, mixtures or substances containing marihuana to a person less than

² *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* (January 19, 2005), <https://www.uscis.gov/laws/policy-memoranda>.

³ *Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children*, 61 Fed. Reg. 13061 (Mar. 26, 1996).

eighteen years of age.” Section 221.50 of the New York Penal Law also provides that criminal sale of marijuana in the second degree is a class D felony under New York law.

The Petitioner’s 2000 conviction for the criminal sale of marijuana in the second degree 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). Accordingly, the Petitioner’s 2000 conviction for a controlled substance violation is not waivable for purposes of determining his inadmissibility under section 212(a) of the Act and the Petitioner is not eligible for a discretionary determination of his good moral character pursuant to section 204(a)(1)(C) of the Act.

In the personal statement he submits on appeal, the Petitioner explains the circumstances surrounding his arrests for the various criminal violations; however, we cannot look behind the Petitioner’s convictions 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 an alien’s guilt or innocence); *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1974) (same). Accordingly, the Petitioner has not established his good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

IV. 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 G-N-F-*, ID# 11556 (AAO May 10, 2016)