



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

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

MATTER OF B-D-H-

DATE: MAY 25, 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 did not establish that she was a person of good moral character and that she married her U.S. citizen husband in good faith, and accordingly, was ineligible for the visa classification.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief and additional evidence. The Petitioner claims that she is a person of good moral character and married her husband in good faith.

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

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).

Section 101(f) of the Act, 8 U.S.C. § 1101(f) 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 (CIMT)] . . .

.....

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without 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. . . .

The eligibility requirements are 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 . . . 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.

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....

(ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

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. . . . 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.

....

(vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

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 is a citizen of Jamaica who entered the United States on January 20, 2007, as a B1 nonimmigrant visitor. She married C-B-¹ a U.S. citizen, on [REDACTED] 2010, in Florida. The

¹ Name withheld to protect the individual's privacy.

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Petitioner filed the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, on March 4, 2014, seeking immediate relative status as the abused spouse of a U.S. citizen. The Director issued a request for evidence (RFE) seeking to obtain, in part, court disposition documents and other information about her criminal history, and information to establish that she married her spouse in good faith. The Petitioner timely responded with additional evidence that the Director found insufficient to establish the Petitioner's eligibility. The Director denied the Form I-360, as criminal charges against the Petitioner remained pending, and she could not determine that the Petitioner was a person of good moral character. The Director further determined that the Petitioner did not marry her spouse in good faith. The Petitioner filed a timely appeal.

III. ANALYSIS

As a threshold matter, the Petitioner argues on appeal that the Director abused her discretion because she did not send a notice of derogatory information prior to issuing the decision. The Director, however, issued an RFE on October 23, 2014, notifying the Petitioner of derogatory information and offering her the opportunity to present evidence of her good faith marriage and good moral character, to which the Petitioner timely responded on January 9, 2015. As such, the Petitioner's argument is moot.

On appeal, the Petitioner submits a brief, a statement, letters, and conviction documents. She asserts that her conviction does not preclude her from establishing her good moral character and that she married C-B- in good faith. 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.

A. Good Moral Character

The record shows that on [REDACTED] 2015, the [REDACTED] convicted the Petitioner, pursuant to her guilty plea, of aggravated identity theft, a felony, in violation of 18 U.S.C. section 1028A(a)(1), and sentenced her to the mandatory sentence of 24 months of imprisonment, 12 months supervised release, and monetary penalties.

1. The Petitioner's Conviction is not a Crime Involving Moral Turpitude (CIMT)

The term, "crime involving moral turpitude" is not defined in the Act. In interpreting the phrase the Board of Immigration Appeals (the Board) held, in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required *mens rea* may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The Eleventh Circuit Court of Appeals, in whose jurisdiction this case arises, follows the categorical approach when determining whether the statute of conviction is a CIMT. *Fajardo v. U.S. Attorney General*, 659 F.3d 1303 (11th Cir. 2011). The statute at 18 U.S.C. section 1028A(a)(1) states that a person who “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person” shall be sentenced to a two-year mandatory prison term. The Board has held that mere possession of false immigration documents does not necessarily entail fraudulent or deceitful conduct and would not categorically constitute a CIMT. *Matter of Serna*, 20 I&N Dec. 579, 585 (BIA 1992) (holding that a conviction for possession of a false immigration document without the intent to use it to defraud the government is not a CIMT). Therefore, because possession is one of the offenses listed under 18 U.S.C. section 1028A(a)(1) and it does not involve moral turpitude, the statute does not categorically involve moral turpitude.

We next determine whether the statute of conviction is divisible or indivisible, and, in doing so, rely on the method for distinguishing divisible statutes from indivisible statutes set forth in *Descamps v. U.S.*, 133 S. Ct. 2276 (2013). According to the court in *Descamps*, an indivisible statute may contain multiple, alternative means of committing the crime while a divisible statute contains multiple, alternative elements of functionally separate crimes. *Id.*, 133 S.Ct. at 2293. Upon review of the relevant jury instructions, we determine that the statute of conviction is indivisible. The Pattern Criminal Jury Instructions for the Eleventh Circuit provides the following instruction for 18 U.S.C. section 1028A(a)(1), in part:

It’s a Federal crime to commit aggravated identity theft.

The Defendant can be found guilty of aggravated identity theft only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly transferred, possessed, or used another person’s [means of identification] [identification documents];
- (2) without lawful authority; and
- (3) during and in relation to [the eligible felony alleged in the indictment].

The Government must prove that the Defendant knowingly transferred, possessed, or used another person’s identity “without lawful authority.” The Government does not have to prove that the Defendant stole the [means of identification] [identification documents], only that there was no legal authority for the Defendant to transfer, possess, or use them. . . .

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Offense 40.3, Aggravated Identity Theft, *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* (2010) (June 2015 Revision). The jury instruction shows that the statute contains multiple, alternative means of committing the crime (“transferred, possessed, or used”), not multiple, alternative elements of separate crimes, and thus under the analysis in *Descamps*, is indivisible. As the statute of conviction is both indivisible and criminalizes an act which is not a CIMT, possession of another’s documents, the Petitioner’s conviction is not for a CIMT.

2. The Petitioner’s Unlawful Acts Preclude a Finding of Good Moral Character

Upon *de novo* review, the record shows that the Petitioner lacks good moral character pursuant to the last paragraph of section 101(f) of the Act, which states, in pertinent part, that “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.” 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. . . .

The record reflects that the Petitioner admitted to government officials that she fraudulently used a birth certificate of a U.S. citizen to obtain a U.S. passport, which is an unlawful act reflecting upon her moral character. While she was not convicted for this offense, the record shows that she told Special Agent [REDACTED] U.S. Department of State, Bureau of Diplomatic Security, she paid \$500 to fraudulently obtain a U.S. birth certificate and social security number belonging to a U.S. citizen. She then used these documents to obtain a U.S. passport and social security card, which are unlawful acts under 18 U.S.C. sections 1542 and 1028A, respectively.

In response to the Director’s RFE the Petitioner stated that she was a person of good moral character, because she was not in deportation proceedings, had no other criminal history, and had five years of employment history with the same employer. She indicated that she took responsibility for her criminal actions, “even though at the time I was not fully aware of the consequences of my actions,” and that since coming to the United States she obtained her GED high school equivalency and was enrolled at [REDACTED]. On appeal, she states that we should find that she is a person of good moral character despite her conviction and unlawful actions because she made a mistake and did not willfully misrepresent her status to commit a crime. The Petitioner submits a letter from her friend and employer, [REDACTED] who states that the Petitioner is honest, hardworking, punctual, and gives extra-ordinary customer service. The record contains copies of three years of the Petitioner’s federal tax returns, but does not contain a copy of her GED diploma or nursing school transcripts.

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As indicated above, the Petitioner was convicted in [REDACTED] 2015 and sentenced to two years of imprisonment. Her remorse for her actions, high school diploma, and steady employment do not outweigh the fact that she has not yet completed the prison term for her conviction and has not shown that she is fully rehabilitated. The Petitioner's commission of unlawful acts and recent conviction demonstrate conduct that falls below the average citizen in the community and adversely reflect upon her moral character pursuant to the final paragraph of section 101(f) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii).² The Petitioner does not argue that extenuating circumstances should absolve her from responsibility for her unlawful acts, or that her unlawful behavior and conviction are related to the abuse.³ For the reasons discussed above, the Petitioner has not demonstrated her good moral character as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

B. Good Faith Marriage

The Director concluded based on the evidence of record that the Petitioner did not establish that she married C-B- in good faith, and the Petitioner does not overcome this finding on appeal. In the Petitioner's initial statement, she indicated that she met C-B- at [REDACTED] where she worked, and they started their relationship as friends. She stated that, although she was initially hesitant, she subsequently fell for C-B-; that he moved in with her in January 2010; and that she said yes when he asked her to marry him on Valentine's Day. She recounted that they talked about "everything and anything" and married at the courthouse due to lack of any family members nearby. In response to the Director's RFE, the Petitioner submitted a letter stating that she could be open with C-B- and was hopelessly in love with him. She stated generally that she was fully committed and dedicated to their relationship. She did not describe their courtship, the wedding ceremony, their shared residences or experiences, and did not give further details of the marital relationship apart from the abuse. The Director noted that at part four of the Form I-360, the Petitioner stated that she began living with C-B- in March 2010, which was inconsistent with her declarations that C-B- moved in with her in January 2010.

The Petitioner also submitted letters from [REDACTED] and [REDACTED] and [REDACTED] both recounted spending time with the Petitioner and C-B-, and observed their love for one another, but neither gave details about any particular social occasion or described the couple's interactions. [REDACTED] the

² While the conviction is not a CIMT, the Petitioner's imprisonment may bar a finding of her good moral character under section 101(f)(7) of the Act, which bars a finding of good moral character of a person "who has been confined, as a result of conviction, to a penal institution for an aggregate period of 180 days or more . . ." The record does not indicate how long the Petitioner has been imprisoned as a result of the conviction for aggravated identity theft, for which she was sentenced to the mandatory two-year prison term. In any further proceeding, the Petitioner should submit evidence to establish the length of her confinement as a result of conviction.

³ In her brief on appeal, the Petitioner's counsel of record stated generally that the Petitioner's husband convinced her to commit the offense, but the Petitioner did not submit any evidence to support this assertion, and unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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manager of [REDACTED] stated that he cooked a meal for the Petitioner and C-B- after the wedding ceremony, described them relaxing to music on the restaurant patio on weekend nights, and stated further that the Petitioner wanted the marriage to last. [REDACTED] did not indicate the source of his personal knowledge about the Petitioner's marital intentions or give details about the times he observed them together as a married couple. [REDACTED] and [REDACTED] each stated that they knew the couple was happily married, and where they lived, but none provided any probative details about any time spent with the Petitioner and C-B-, their courtship, or their shared lives. We concur with the Director's finding that the witness statements were too vague, and that they did not provide sufficient details about the Petitioner's and C-B's courtship, the wedding ceremony, their relationship, and experiences to establish that the Petitioner married C-B- in good faith.

Nor did the relevant documentary evidence, including copies of a lease agreement, an electric bill, a phone bill, bank statements, tax return transcripts, and photographs establish the Petitioner's good faith marital intentions. One of the bank statements is dated in August 2012, but the account is in the name of the Petitioner only. The tax return transcripts show that the Petitioner and C-B- filed joint tax returns in 2010 and 2011, which are some evidence of a good faith marriage, but do not, without corroborating evidence, establish that the Petitioner married C-B- in good faith. The photographs show the Petitioner and C-B- together, but do not reflect on the Petitioner's good faith marital intentions.

On appeal, the Petitioner submits a new personal statement. With reference to the discrepancy between the January 2010 and March 2010 dates that the record showed as the beginning of the Petitioner's joint residence with C-B-, the Petitioner states that she needed to put C-B- on the lease in January 2010 for financial reasons, but he did not move in until after they married at the end of [REDACTED] 2010. The record, however, does not contain a January 2010 lease, but a joint lease dated January 1, 2013, which is inconsistent with other evidence in the record. In connection with her Form I-751, Petition to Remove Conditions on Residence, the Petitioner testified under oath that she last saw C-B- in August 2012, and last lived together with him in August 2012.⁴ This testimony is inconsistent with the joint lease agreement signed by both the Petitioner and C-B- on January 1, 2013, and with the Petitioner's statement on the Form I-360 that she last resided with her spouse from January 2010 until November 1, 2013. The record does not contain any explanation for these inconsistencies. The electric bill, phone bill, and all but one of the bank statements are dated subsequent to August 2012, the date when she testified that she last lived with her spouse, and are of little probative value to establish that the Petitioner married her spouse in good faith.

The Petitioner submits newly dated letters from [REDACTED] and [REDACTED] which are substantially similar to the letters submitted in response to the RFE that the Director found insufficient. [REDACTED] adds that he sometimes shared a drink with

⁴ The Director approved the Form I-130, Petition for Alien Relative, filed by C-B- on behalf of the Petitioner, and subsequently conditionally approved the Petitioner's Form I-485 Application to Register Permanent Residence or Adjust Status. The Petitioner subsequently filed the Form I-751, which the Director denied.

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the Petitioner and C-B- when he drove them home after work, but he does not give details about any particular occasion. [REDACTED] and [REDACTED] add observations about C-B-'s abuse of the Petitioner, but do not add further details about the courtship, shared residences, or marital experiences. None of the witnesses attended the wedding ceremony and none provides sufficient information about the marital relationship or the Petitioner's intentions in marrying C-B- to establish that the Petitioner entered into marriage with her spouse in good faith. The Petitioner does not submit additional documentary evidence on appeal.

On appeal, the Petitioner asserts that the Director erred in finding that the Petitioner married C-B- for the purpose of evading the immigration laws, and that the Director's conclusion was not supported by substantial and probative evidence. The Director, however, correctly determined that the preponderance of the relevant evidence did not establish that the Petitioner entered into her qualifying marriage in good faith as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act and as further explicated in the regulations at 8 C.F.R. §§ 204.2(c)(1)(ix) and (2)(vii). The Petitioner mistakes the burden of proof required in this proceeding to that required under Section 204(c) of the Act, which bars approval of a subsequent visa petition of a petitioner who has been found to enter into a marriage for the sole purpose of evading the immigration laws. The evidence of marriage fraud in adjudicating section 204(c) cases must be substantial and probative. See *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In the instant proceeding, the burden is on the Petitioner to establish by a preponderance of the evidence that she married C-B- in good faith. See *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). Here, that burden has not been met.

When viewed in the totality, the preponderance of the relevant evidence does not demonstrate that the Petitioner entered into marriage with her spouse in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) 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 B-D-H-*, ID# 16466 (AAO May 25, 2016)