U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25611251

Date: MAY 25, 2023

Appeal of Vermont Service Center Decision

Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (Abused Spouse of U.S. Citizen or Lawful Permanent Resident)

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 of the Vermont Service Center initially approved the petition, but after providing notice to the Petitioner, subsequently revoked approval, concluding that the Petitioner was statutorily barred from establishing good moral character and finding that her petition is otherwise barred from approval by section 204(c) of the Act. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Pursuant to section 205 of the Act, 8 U.S.C. § 1155, the Director may revoke the approval of any petition approved under section 204 of the act, "at any time, for what [they] deem to be good and sufficient cause." The regulations provide for revocation upon notice to the petitioner "when necessity for the revocation comes to the attention" of the Director. 8 C.F.R. § 205.2.

Immigrant classification under the VAWA provisions may be granted to an individual subjected to battery or extreme cruelty by their U.S. citizen spouse if that individual demonstrates, among other requirements, that they are a person of good moral character. Section 204(a)(1)(A)(iii) of the Act. Primary evidence of good moral character is the VAWA self-petitioner's affidavit, which should be accompanied by local police clearances or state-issued criminal background checks from where the petitioner resided during the three years before filing the VAWA petition. 8 C.F.R. § 204.2(c)(2)(v). A VAWA self-petitioner's good moral character is assessed under section 101(f) of the Act, 8 U.S.C. § 1101(f). 8 C.F.R. § 204.2(c)(l)(vii). Section 101(f) of the Act enumerates grounds that will

automatically preclude a finding of good moral character including, as relevant here, where the petitioner has been convicted at any time of an aggravated felony. Section 101(f)(8) of the Act. Section 101(f) of the Act applies "during the period for which good moral character is required to be established ...." However, section 101(f) of the Act also states that "[t]he 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 ...."

USCIS evaluates a VAWA self-petitioner's claim of good moral character on a case-by-case basis, considering the provisions of section 101(f) of the Act and the standards of the average citizen in the community. 8 C.F.R.§ 204.2(c)(1)(vii). As explained in policy guidance, USCIS generally examines the three-year period immediately preceding the date the VAWA petition is filed; however, if there is or acts do not fall under the enumerated grounds at section 101(f) but are contrary to the average citizen in the community, we consider all the evidence in the record to determine whether the self-petitioner has established their good moral character. *See* 3 *USCIS Policy Manual* D.2(G)(1), https://www.uscis.gov/policy-manual. Unless a VAWA self-petitioner establishes extenuating circumstances, they will be found to lack good moral character if they committed unlawful acts that adversely reflect upon their moral character, although the acts do not require an automatic finding of lack of good moral character, or were not convicted of an offense or offenses but admit to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. 8 C.F.R. § 204.2(c)(1)(vii). While we consider any credible evidence relevant to the VAWA self-petition, we determine, in our sole discretion, what evidence is credible and the weight to give to such evidence. Section 204(a)(1)(J) of the Act; 8 C.F.R. § 204.2(c)(2)(i).

II. ANALYSIS

The Petitioner is a citizen and national of Nigeria who last entered the United States in 2005 with advanced parole. The Petitioner married her second spouse, E-B-,[1] in [redacted] 2004 and divorced him in [redacted] 2007. The Petitioner then married P-J-P-, a U.S. citizen, in [redacted] 2008. In [redacted] 2015, the Petitioner was convicted of Arson under Texas Penal Code Annotated (Tex. Penal Ann.) section 28.02(a) and sentenced to two years confinement. The Petitioner filed the current VAWA petition in March 2018 based on her relationship to P-J-P-. The Director approved the petition but in later adjudicating the Petitioner's related Form I-485, Application to Register Permanent Residence or Adjust Status, the Director determined that the VAWA petition had been approved in error. The Director therefore issued a notice of intent to revoke (NOIR) approval of the petition, informing the Petitioner that she was statutorily barred from establishing the requisite good moral character because she had been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act (relating to crimes of violence) and that section 204(c) of the Act otherwise bars approval of the VAWA petition because she had previously entered a fraudulent marriage with E-B- to obtain an immigration benefit. The Petitioner timely responded but the Director ultimately revoked approval of the petition on the grounds set forth in the NOIR.

On appeal, the Petitioner argues that her conviction for arson under Tex. Penal Ann. § 28.02(a) is not an aggravated felony because the statute is divisible and "may not constitute" a crime of violence. In the alternative, the Petitioner argues that if her conviction for arson is an aggravated felony, she can

[1] We use initials to protect the privacy of individuals.

still meet the good moral character requirements for VAWA because she is otherwise eligible for discretionary relief.

The U.S. Court of Appeals for the Fifth Circuit, in which this case arises, applies the categorical approach in looking at whether a conviction is for an aggravated felony offense. *Rodriguez Gonzalez v. Garland*, 61 F.4th 467, 469 (5th Cir. 2023). Under this approach, we look not to the facts of the underlying case but rather to whether statutory definition of the state crime categorically fits within or matches the generic federal definition of the removable offense. *Id.* at 469-70. However, a statute may be divisible, containing multiple offenses, if it lists or includes multiple, alternative elements that a judge or jury must find, or to which a defendant must admit, to convict a defendant under that statute, rather than different means of committing the same element. *Mathis v. United States*, 136 U.S. 2243, 2249 (2016); *Moncrieffe v. Holder*, 569 U.S. 184, 190- 91 (2013). If the statute is divisible, we may use the modified categorical approach to examine the underlying record of conviction, including the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented, to determine which offense within the divisible statute formed the basis of the conviction. *Mathis*, 136 U.S. at 2249*; Shepard v. U.S.*, 544 U.S. 13, 16 (2005); *see also Larin-Ulloa v. Gonzales*, 462 F.3d 456, 463 (5th Cir. 2006). We must then determine whether the specific offense of which the noncitizen was convicted under the divisible statute is categorically an aggravated felony. *Mathis*, 136 U.S. at 2249.

Upon de novo review, the Director had good and sufficient cause to revoke approval of the VAWA petition. Although the Petitioner is correct that the statute under which she was convicted is a divisible statute, the record indicates that her conviction nevertheless is an aggravated felony as a crime of violence under 101(a)(43)(F) of the Act. Section 101(a)(43)(F) of the Act provides that a crime of violence, as defined by title 18 of the U.S. Code section 16 (but not including a purely political offense), for which the term of imprisonment is at least one year, constitutes an aggravated felony. Section 16(a) of Title 18 of the U.S. Code defines a crime of violence as an offense that has as an element "the use, attempted use, or threatened use of physical force against the person or property of another."[2]

In this case, the Judgement of Conviction by Court submitted with the appeal identifies the Petitioner's offense as arson and classifies it as a second-degree felony. Although arson falls under Tex. Penal Ann. § 28.02, that statute is divisible as it includes multiple, distinct arson offenses of varying degrees. However, a second-degree felony arson conviction falls only under Tex. Penal Ann. § 28.02(a). *See* Tex. Penal Ann. § 28.02(d). Consequently, the Petitioner's conviction is under Tex. Penal Ann. § 28.02(a), which at the time of 2015 conviction, provided in pertinent part:

> A person commits an offense if the person starts a fire, regardless of whether the fire continues after ignition, or causes an explosion with intent to destroy or damage:
>
> (1) any vegetation, fence, or structure on open-space land; or
> (2) any building, habitation, or vehicle:

[2] The U.S. Supreme Court held that 18 U.S.C. § 16(b), which is the residual clause of the federal criminal code's definition of "crime of violence" that is also incorporated into the definition of aggravated felony at section 101(a)(43)(F) of the Act, is unconstitutionally vague in violation of due process. *Sessions v. Dimaya*, 138 U.S. 1204 (2018). Therefore, we only analyze the Petitioner's conviction under 18 U.S.C. § 16(a).

(A) knowing that it is within the limits of an incorporated city or town;
(B) knowing that it is insured against damage or destruction;
(C) knowing that it is subject to a mortgage or other security interest;
(D) knowing that it is located on property belonging to another;
(E) knowing that it has located within it property belonging to another; or
(F) when the person is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another.

As Tex. Penal Ann. § 28.02(a) itself includes multiple subsections, we must determine whether the subsections set forth alternative elements establishing separate, distinct second-degree arson offenses that render section 28.02(a) further divisible or if they merely list various means of committing the same second-degree arson. The *2016 Texas Criminal Pattern Jury Charges: Crimes against Persons& Property*[3] are instructive as they indicate that Tex. Penal Ann. § 28.02(a) sets forth separate arson offenses under subsections (1) and (2) and that subsection (2) in turn likewise sets forth multiple, separate arson offenses. Consequently, Tex. Penal Ann. § 28.02(a) (and subsection (a)(2) in turn) is divisible, and we look to the underlying record of conviction to determine the subsection under which the Petitioner was convicted. Here, the record of conviction includes the criminal complaint filed with the criminal court, which charged the Petitioner as follows:

> "[O]n or about August 18, 2012, did then and there unlawfully START A FIRE by IGNITING A FLAMMABLE LIQUID with the intent to destroy or damage a building… and the defendant knew that the BUILDING was within the incorporated limits of a city… AND knew that the BUILDING was located on property belonging to another."

(emphasis present). The criminal complaint establishes the Petitioner was charged with arson of a building, habitation, or vehicle "knowing it is located on property belonging to another," consistent with Tex. Penal Ann. § 28.02(a)(2)(D), and the court judgment indicates she was ultimately convicted.

We next assess whether the Petitioner's second-degree arson conviction under section 28.02(a)(2)(D) of the Texas Penal Code Annotated is categorically a crime of violence. As stated, a crime of violence is defined as an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. 18 U.S.C. § 16(a). A crime of violence requires "a higher degree of intent than negligent or merely accidental conduct." *Leocal v. Ashcroft,* 543 U.S. 1 (2004). The elements of arson under Tex. Penal Ann. § 28.02(a)(2)(D) fit within this generic definition of crime of violence, as it includes the use of physical force in the form of starting of a fire or causing an explosion with a specific intent to destroy or damage property knowing it to belong to another. *See Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007) (finding that "fire is itself a physical force"). Therefore, the Petitioner's conviction under Tex. Penal Ann. § 28.02(a)(2)(D) is categorically a crime of violence under 18 U.S.C. § 16(a) for which the Petitioner was sentenced to at least one year incarceration, rendering her conviction an aggravated felony under section 101(a)(43)(F) of the Act. As a result, the Petitioner is permanently barred from establishing good moral character for VAWA classification. Section 101(f)(8) of the Act; 8 C.F.R. § 204.2(c)(l)(vii).

---

[3] Committee on Pattern Jury Charges-Criminal, State Bar of Texas, *Texas Criminal Pattern Jury Charges: Crimes Against Persons & Property*. 299-312 (George Dix et al. eds., 2016)

The Petitioner argues that even if the conviction is an aggravated felony, the crime was committed with the intent to end her own life due to her spouse's abuse and she is therefore eligible for a waiver and discretionary relief. Specifically, she asserts that she can establish good moral character because she is eligible for an exception under section 240A(b)(2)(C) of the Act, 8 U.S.C. § 1229b(b)(2)(C). However, that provision is not applicable here as it relates to cancellation of removal for certain non-permanent residents in removal proceedings who are battered spouses or children of U.S. citizens.

Since our finding that the Applicant is statutorily barred from establishing the requisite good moral character is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding the Director's determination that section 204(c) of the Act bars approval of her VAWA petition. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

Based on the foregoing, the Petitioner's arson conviction under Tex. Penal Ann. § 28.02(a)(2)(D) is an aggravated felony as defined in section 101(a)(43)(F) of the Act that bars a finding of good moral character under section 101(f)(8) of the Act. As a result, the Petitioner was ineligible for immigrant classification under VAWA at the time of approval. Accordingly, the record establishes good and sufficient cause for revocation of the approval of the VAWA petition.

ORDER: The appeal is dismissed.