



NEWSLETTER

AUGUST 2012

IN THE NEWS

Our purpose is to centralize assistance for advocates and attorneys facing complex legal problems in advocating for immigrant survivors of domestic violence and sexual assault.

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A Practice Guide for Representing Self-Petitioning Applicants With Criminal Convictions or Criminal History (Part 3 of 3)

By Ann Benson & Jonathan Moore¹

Editor's Note: Due to the length of this article, it has been divided into three parts. This is the third of these parts. The entire Advisory is also available on our website at www.asistahelp.org.

Self-Petition GMC Exception Under INA § 204(a)(1)(C)

Language & Scope of the Exception

INA § 204(a)(1)(C) reads:

Notwithstanding section 101(f) [8 U.S.C. § 1101(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) [8 U.S.C. § 1182(a)] or deportability under section 237(a) [8 U.S.C. § 1227 (a)] shall not bar the Attorney General from finding the petitioner to be of good moral character under subparagraph (A)(iii), (A)(iv),

(B)(ii), or (B)(iii) if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty.

This provision gives CIS the ability to make a finding of good moral character for VAWA self-petitioners who are otherwise disqualified under INA § 101(f) if: (1) a waiver is available either for deportability under INA § 237 or inadmissibility under § 212; and, if (2) the "act or conviction" was connected to the alien's abuse. This exception is potentially applicable to all self-petitioners, including self-petitioners living abroad filing under INA § 204(a)(1)(A)(v) or § 204(a)(i)(B)(iv).²

Applying for a Finding of GMC under INA § 204(a)(1)(C)³

Step One: Determine That a Waiver Is Available

² See William R. Yates, Ass. Dir. Oper. U.S.C.I.S., Memo re: Determinations of Good Moral Character in VAWA-Based Self-Petitions, Jan. 19, 2005, http://www.asistahelp.org/documents/resources/GMC_011905_C59955EE7B784.pdf

³ We refer to § 204(a)(1)(C) as a statutory exception, one that arguably requires the application of law to facts, and not as a waiver, but CIS clearly describes the finding of GMC per § 204(a)(1)(C) as a discretionary determination. See Yates Memo, p. 4 "Step 4:.. Whether a self-petitioner is a person of good moral character is, in accordance with section 204(a)(1)(C) of the Act, a discretionary determination to be made by the adjudicating officer." At: http://www.asistahelp.org/documents/resources/GMC_011905_C59955EE7B784.pdf

Since this is bundled with an I-360 application that also has a discretionary component, the practical difference is not great.

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If the self-petitioner's crime or act could bar a finding of GMC, the next step is to determine whether the self-petitioner qualifies for the exception. For a useful chart to determine whether a finding of an exception is available for a GMC bar, advocates should consult the Yates GMC memo from USCIS⁴ available on the ASISTA website. Note, in adjudicating a request for a § 204(a)(1)(C) finding, the CIS examiner does not have to find that a waiver would be granted, only that one would be available for filing at the time the adjustment of status application or visa application is filed.

A number of waivers may be available, including those found at §§ 212(d)(11), 212(h)(1), 212(i)(1), 237(a)(7) and 237(a)(1)(H) of the INA. Under each of these sections, the bar to good moral character is only waived if the requisite relationship between the criminal conduct and the abuse or extreme cruelty is established, and if the facts of the case warrant a finding or judgment of good moral character pursuant to INA § 204(a)(1)(C). DHS interprets "connection" to mean "that the self-petitioner would not have committed the act or crime in the absence of the battering or extreme cruelty,"⁵ meaning that advocates should work with victim advocates to develop the supporting evidence documenting the reasons that victims of abuse may engage in criminal acts.

⁴ See *Table of Waivable Conduct*, Yates Memo, *supra* note 2.

⁵ *Id.*

INA § 212(d)(11) Waivers for Alien Smuggling

Guidance provided by CIS regarding determinations of GMC for VAWA-based self-petitions lists this waiver as available for self-petitioners found inadmissible for alien smuggling.⁶ This section provides that the AG may, in his discretion for humanitarian purposes, to assure family unity, or when it is in the public interest, waive § 212(a)(6)(E) grounds of inadmissibility. This waiver is available to self-petitioners seeking admission or adjustment as immediate relatives (of USC abusers), or as family members under INA § 203 (of LPR abusers). The waiver may be available only if the individual that the self-petitioner encouraged, induced, assisted, abetted, or aided was the self-petitioner's spouse, parent, son or daughter. Self-petitioners seeking admission under INA § 203 include parents, spouses and minor children (immediate relatives) of USC abusers and the unmarried sons and daughters of citizens or spouses, and unmarried sons and daughters of permanent resident aliens.

For VAWA self-petitioners seeking a § 204(a)(1)(C) exception, on the basis that a § 212(d)(11) alien smuggling waiver of inadmissibility is available at adjustment, the smuggling of family members also needs to be connected to the abuse or extreme cruelty. For example, a self-petitioner forced by an abusive partner to leave family members behind may have helped them come into the US, or self-petitioners may have helped a noncitizen relative to come to the U.S. in order to cope with the abuse.

⁶ *Id.*

INA § 212(h) Waivers for Certain Crimes

Waiver of certain criminal and related grounds. This is the principal immigrant waiver available for criminal grounds of inadmissibility. § 212(h)(1)(C) specifically includes VAWA self-petitioners. The GMC bars that may be waived under this section include crimes of moral turpitude (CIMT); multiple criminal convictions with aggregate sentences of 5 years; and prostitution.⁷ The potentially broad scope of this waiver is tempered by the requirement of § 204(a)(1)(C) that the conduct waived be connected to the abuse or extreme cruelty. Therefore, it is critical to learn the circumstances surrounding the conduct, and the state of mind of the self-petitioner at the time, and include this information in the self-petitioner's affidavit.

Violent or dangerous crimes. Under 8 C.F.R. § 212.7(d), the AG will

⁷ A § 212(h) waiver will also waive inadmissibility under § 212(a)(2)(A)(i)(II), for a drug offense that is limited to single offense of simple possession of 30 grams or less of marijuana. This is the only drug crime that is waivable when applying for an immigrant visa. However, under § 101(f)(3) this is explicitly not a bar to GMC, so no § 204(a)(1)(C) GMC exception—and no connection to the abuse-- is required to be shown. A § 212(h) waiver will nonetheless be required for such an offense at the adjustment stage. The BIA has ruled that an offense of simple possession of marijuana, when possession in a custodial setting (jail) or a restricted area such as a school zone is an element of the offense, no longer qualifies as simple possession. Such offenses presumably both bar GMC and admission to the US. *See Matter of Martinez-Zapata*, 24 I. & N. Dec. 424 (BIA 2007) (on sentence enhancement for possession of marijuana in a drug-free zone); *Matter of Moncada*, 24 I. & N. Dec. 62 (BIA 2007), (possession while in prison is not "simple possession").

presumptively not exercise discretion and grant a § 212(h) waiver where the acts or convictions involve "violent or dangerous crimes." In some extraordinary cases, such as those involving national security or foreign policy considerations, or cases where denial of the petitioner's application would result in "exceptional and extremely unusual hardship," a waiver may be available. In some cases, even showing extraordinary circumstances may not be sufficient to render a waiver available.⁸ However, for the purpose of a

§ 204(a)(1)(C) exception, the requirement is only that there be a connection to the abuse, that a § 212(h) waiver be available, and that the finding of GMC be otherwise merited. Since the client is not actually applying (yet) for the § 212(h) waiver, she should not have to qualify under 8 CFR § 212.7 (yet) in order to show that a waiver is available and qualify under § 204(a)(1)(C). (Of course, if a connection to abuse were demonstrated and a § 204(a)(1)(C) GMC finding had been made, it may help to demonstrate later an "extraordinary circumstance.")

But, in case CIS were to decide that it cannot discount the GMC bar under § 204(a)(1)(C), for a "violent or dangerous" CIMT offense because it believed a waiver would really *not* be available due to the restrictions of 8 C.F.R. § 212.7(d), more information about the "violent or dangerous" crimes standard follows:

Heightened Discretion Standard For Crime Classified A "Violent or Dangerous." In the case of VAWA self-

⁸ *See Practice Guide for Representing U Visa Applicants with Criminal Convictions or Criminal History*, available on ASISTA's website.

petitioners who are inadmissible on criminal grounds, advocates can argue that limitation on § 212(h) discretion under 8 C.F.R.

§ 212.7(d) was meant to be applied only to the type of lethally dangerous offenses discussed in *Matter of Jean*,⁹ a case involving a homicide of an infant.

The history of this heightened standard for the exercise of discretion is that this language was first promulgated by the Attorney General (AG) in denying a discretionary

§ 209(c) refugee waiver, in a case called *Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002). In overturning the BIA, the AG in *Jean* evaluated a waiver application by a person who “confessed to beating and shaking a nineteen-month-old child to death” and whose confession “was corroborated by a coroner’s report documenting a wide-ranging collection of extraordinarily severe injuries.”¹⁰

Another case the AG used as a baseline in *Jean*, was the offense treated by the BIA in an earlier decision, *Matter of H-N*.¹¹ The AG noted that he disagreed with the grant of a

§ 209(c) refugee waiver in that case, based on the equities of USC children and an LPR spouse. The conviction in that case was for a second-degree robbery that the AG described as “participation in a burglary in which one of the applicant’s co-conspirators shot a woman to death in front of her children.”¹² Both offenses discussed were thus extremely violent, and life-endangering.

In *Jean*, the AG himself prefaced his ruling in that case by indicating his agreement with Part II of Board member Filippu’s concurrence and dissent in *Matter of H-N*. That part of the decision describes in detail a kind of home invasion where a co-conspirator shot a woman to death in the head. Filippu’s opinion also put significant weight on the fact that H-N- claimed to have been virtually uninvolved, and to have pleaded guilty to robbery due to bad translation and lack of explanation by her public defender. Filippu found the respondent’s “assertion of complete innocence” to be “inconsistent,” and contradicted by other evidence.¹³

Within a year of *Jean*, DHS enacted a new regulation governing the exercise of discretion in § 212(h) waiver cases: 8 CFR § 212.7(d).¹⁴ That regulation provides that in cases where individuals have committed “violent or dangerous crimes,” the Attorney General will not exercise his discretion to grant waivers under 8 U.S.C. § 1182(h) (known as 212(h) relief) unless the individual can show “exceptional and extremely unusual hardship.” This regulatory limit on discretion has been upheld in the Second, Fifth, and Ninth Circuits.¹⁵

A look at these cases shows the kinds of offenses that some immigration judges have found to be “violent or dangerous.” The Courts found they did not have jurisdiction to reverse such

⁹ *Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002).

¹⁰ *Id.* at 383.

¹¹ *Matter of H-N*, 22 I. & N. Dec. 1039 (BIA 1999).

¹² *Jean* 23 I. & N. Dec. at 382 (“The majority there treated the applicant’s crime - participation in a burglary in which one of the applicant’s co-conspirators shot a woman to death in front of her children - as a virtual afterthought.”).

¹³ *Id.* at 382; *H-N*, 22 I. & N. Dec. at 1051-2 (BIA 1999) Filippu, concurring and dissenting.

¹⁴ 8 U.S.C. § 1182(h), INA § 212(h) is the principal waiver of inadmissibility for crimes involving moral turpitude. When in removal proceedings, the parallel regulation is 8 C.F.R. § 1212.7(d).

¹⁵ *Mejia v. Gonzales*, 499 F.3d 991 (9th Cir. 2007); *Perez Pimentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008); *Samuels v. Chertoff*, 550 F.3d 252 (2d Cir. 2008)

rulings, and that such guides to discretion were allowable.

- A conviction for child molestation and commission of lewd and lascivious acts upon a child under Cal. Penal Code § 288(a), (c), “based on . . . repeated molestation of his step-daughter, . . . beginning when [she] was twelve years old and continuing for approximately three and a half years. This conduct included slapping her, massaging her breasts, and fondling her genitals. Mejia pleaded guilty and served seven months in jail.”¹⁶
- A 1983 conviction for burglary: “[h]e said he had agreed to help a man who claimed he was removing items from his own home. . . . [H]e was sentenced to two years of imprisonment and served only nine months. . . . The IJ found that . . . the burglary conviction constituted a violent crime. Pursuant to § 212.7(d), the IJ found that Pimentel must establish that the denial of a visa ‘would result in exceptional and extremely unusual hardship.’ The IJ concluded that, although Pimentel’s U.S. citizen children would suffer ‘extreme hardship’ if they moved to Mexico with Pimentel, he had not shown the required ‘exceptional and extremely unusual hardship.’”¹⁷
- Attempted robbery in the first degree under NY Penal Law §§ 110 and 160.15(2), which require the

use of force, or injury, or use of a weapon, with an indeterminate sentence of up to four-and-a-half years of imprisonment.¹⁸

Challenging the designation of an offense as “violent or dangerous.” If this is a potential issue for your client, it is important to argue that “violent or dangerous crimes” refers to the highest tier of lethally violent offenses against persons, using *Jean* and the offense in that case and the example cited from *Matter of H-N-* as a baseline: offenses involving homicide. Barring that, it may be possible to distinguish the circumstances and nature of your client’s convictions from those cited in *Jean* and *H-N-* and, if possible, from the offenses and conduct in *Mejia*, *Perez-Pimentel*, and *Samuel*, *supra*.

For example, a simple assault conviction for slapping someone, may fit a literal definition of “violent,” but is most likely outside the type of extreme offense to which the Attorney General intended the new waiver standard to apply. In addition, an offense relating to a controlled substance may be categorized by many as “dangerous,” either to the user or to society, just as a DUI can be a dangerous offense. However, there are arguments that the history of the “violent or dangerous” standard, given above, clarifies that such offenses were not intended to come under the heightened standard.

In instances where it may help your client, emphasize that the “violent or dangerous crime” determination requires an actual examination of “the facts underlying [a] conviction,” and that “[t]he determination in *Jean* was fact-based, not

¹⁶ *Mejia*, *supra* note 15, at 994.

¹⁷ *Perez Pimentel*, *supra* note 15, at 323-324.

¹⁸ *Samuels*, *supra* note 15, at 254-255.

categorical.”¹⁹ Applying a heightened standard without allowing an examination of all the circumstances underlying the conviction, could turn the “violent or dangerous crime” standard into a kind of a *de facto* threshold which precludes a full examination of the offense, based only on the statutory label, and this was not likely the intent of the regulation.

In evaluating such waivers it may be helpful to look to other examples, such as the definition of “exceptional circumstances” at INA § 240(e)(1) which includes (being a victim of) “battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien.” In another immigration law context (employment visas), the phrase “extraordinary circumstances” has been defined as something that would “impose an extreme hardship on the petitioner or that the beneficiary’s services are in the national interest, welfare, or security of the United States.”²⁰ Duress by itself has been found to amount to an “extraordinary circumstance.”²¹

If a § 204(a)(1)(C) exception to the GMC bars were unexpectedly denied because an offense was classified as “violent or dangerous,” then you may want to consider whether a second application is worthwhile. If there are additional equities that were not originally presented that could show exceptional and extremely unusual hardship and other extraordinary factors, or a valid argument that the offense was

not “violent or dangerous” that was not made, the regulations don’t prohibit such a second attempt.

INA § 212(i) Waivers for Fraud & Misrepresentation

This is a waiver of INA § 212(a)(6)(C)(i), for being inadmissible for fraud or willful misrepresentation of a material fact. This ground of inadmissibility has generally required a misrepresentation before a government official,²² and (unlike the unwaivable false claim to US citizenship ground at § 212(a)(6)(C)(ii)), should not therefore be triggered by a false statement to an employer or on an I-9. A § 212(i) waiver won’t necessarily be needed in connection with a GMC waiver unless there was “false testimony” as defined in § 101(f)(6), which requires false oral testimony under oath. (See above.)

The § 212(i) waiver has a specific clause for VAWA self-petitioners who must “demonstrate[] extreme hardship to the alien [self-petitioner] or the alien’s United States citizen, lawful permanent resident, or qualified alien parent or child.”²³ INA

§ 212(a)(6)(C)(ii), immediately following the inadmissibility subsection, covers a false claim to US citizenship and is not covered by the § 212(i) waiver. While a false claim to US citizenship is a nonwaivable ground of inadmissibility, if it does not amount to “false testimony” (under oath, etc.) it is not a *per se* or

¹⁹ *Rivas-Gomez v. Gonzales*, 225 F. App’x. 680 (9th Cir. 2007).

²⁰ *Matter of Safetran*, 20 I. & N. Dec 49 (Comm’r 1989).

²¹ *Matter of G*, 4 I. & N. Dec. 57 (BIA 1950) (in visa petition proceedings).

²² See *Matter of Y-G-*, 20 I. & N. Dec 794 (BIA 1994); *Matter of D-L- & A-M-*, 20 I. & N. Dec. 409 (BIA 1991); *Matter of L-L-*, 9 I. & N. Dec. 324 (BIA 1961).

²³ 8 U.S.C. § 1182(i)(1); INA § 212(i)(1). “Qualified alien” is defined at 8 U.S.C. § 1641(c)(1)(B).

automatic bar to GMC under § 101(f).²⁴ This refers to the confusing language at the end of § 101(f), that voting or a false claim to USC cannot be used to bar GMC if the person had a good-faith belief that she was a citizen or was entitled to vote.

INA § 237(a)(1)(H)(iii) Waivers for Fraud & Misrepresentation at Admission

This provision waives removal of non-citizens who were inadmissible for fraud or misrepresentation of a material fact under § 212(a)(6)(C)(i) at the time of admission or of adjustment, if they are VAWA self-petitioners. This section operates to waive inadmissibility directly resulting from such fraud or misrepresentation.

“Inadmissible at the time of entry or of adjustment of status” is the deportation ground that applies to non-citizens who are here “after admission” but were nonetheless inadmissible when admitted, and so serves to incorporate the grounds of inadmissibility into the grounds of deportation.²⁵

INA § 237(a)(7) Waiver of Domestic Violence & Stalking Offenses

This “waiver for victims of domestic violence” can waive the deportation grounds relating to crimes of domestic violence and stalking under INA § 237(a)(2)(E)(i), if certain conditions are met. This deportation ground does not have parallel inadmissibility grounds and

is not listed as a bar to GMC under INA § 101(f)(3).

This waiver allows the Immigration Court to look beyond the criminal court record and waive the DV removal grounds for non-citizens who have been battered or subjected to extreme cruelty and who were not/was not the primary perpetrators of violence in the relationship, upon a determination that (1) the non-citizen was acting in self-defense; (2) the non-citizen was found to have violated a protection order intended to protect the alien; or (3) the person committed, was arrested for, convicted of, or pled guilty to a crime that did not result in serious bodily injury, and where there was a connection between the crime and the alien’s having been battered or subjected to extreme cruelty.

Step Two: Establishing a Connection to the Abuse

If a waiver is available for the act or conviction, the self-petitioner must then demonstrate that the disqualifying conduct is “connected” to the battering or extreme cruelty. Generally, finding that the conduct is “connected” means that it would not have occurred absent the abuse or cruelty of the citizen or legal permanent resident. This does not necessarily mean that the act or conviction needs to occur during the marriage to self-petitioner’s US citizen or legal permanent resident spouse. The adjudicator may also consider conduct that occurs prior to the marriage as long as the requisite “connection” to the battering or extreme cruelty is established.

Evidence establishing this connection must demonstrate:

²⁴ See *Matter of Guardarrama*, 24 I. & N. Dec. 625 (BIA 2008) (A false claim of citizenship may cause a person to be found to lack GMC, but the catch-all provision of § 101(f) does not *automatically* mandate such a finding).

²⁵ 8 U.S.C. § 1227(a)(1)(A); INA § 237(a)(1)(A).

- (1) The circumstances surrounding the act or conviction, including the relationship of the abuser to, and his/her role in, the act or conviction committed by the self-petitioner; and
- (2) The requisite causal relationship between the act and the battering or extreme cruelty.²⁶

The adjudicator should take into account the full history of abuse in the case, including the coercive, controlling behavior of the abuser, the need to protect oneself from the abuse, or the need to escape an abusive relationship. It is crucial that social science evidence explaining how victims cope with and survive through abusive behavior is included. The adjudicator has the authority to determine the credibility and probative value of the evidence submitted by the self-petitioner. The adjudicator's review of the evidence is subject to 8 USC § 1367. This statute provides that, unless some exception applies,²⁷ information disclosed solely by a self-petitioner's abuser may not be used by immigration officials to make an adverse determination of admissibility or deportability, nor may it be disclosed to anyone other than sworn DHS and bureau or agency officials, for legitimate department, bureau or agency purposes. Thus, it is favorable to encourage self-

²⁶ See Yates Memo, *supra* note 2, at 3.

²⁷ Exceptions at 8 U.S.C. § 1367(b) include, but are not limited to, disclosure of information for use similar to census information, for use by law enforcement officials for a legitimate law enforcement purpose, in connection with judicial review of a determination, where confidentiality is preserved, for determination of eligibility for certain benefits. 8 U.S.C. § 1367(a)(1)(F), adds, however "unless the alien has been convicted of a crime or crimes listed in [the criminal grounds of deportation at 237(a)(2)]."

petitioning clients to fully and completely disclose the circumstances surrounding the criminal act or conviction, including how the client was coping with the abuser's coercion or control. This information may be instrumental in determining that the act or conviction is sufficiently connected to the abuse or extreme cruelty.

Additional Issues Related To the §204(a)(1)(C) Exception

When the Conviction IS an Aggravated Felony but Not a CIMT

Vermont and the CIS adjudicators may well find GMC under the exception and approve a self-petition, if the connection to the abuse is well-established, and the person is otherwise deserving, without further ado. This seems to conform to legislative intent. However, it is possible that an aggravated felony conviction that is not a CIMT might be denied because an adjudicator thought there was no waiver. In some cases advocates might want to be sure to point out ways that the offense could or might be considered to "involve turpitude" and so is waivable at adjustment under § 212(h)(1)(C), a leaving an easier path to approval.

However, some aggravated felony offenses do not involve turpitude. An example of this could be a simple assault that is not a crime involving moral turpitude (CIMT), but qualifies as a "crime of violence" and gets a one-year sentence. Take for instance a conviction for domestic battery in violation of California Penal Code §§ 242 and 243(e)(1) or Washington's RCW § 9A.36.041, Assault in the Fourth Degree. These simple assault statutes are not categorically

CIMTs.²⁸ Yet RCW § 9A.36.041, which is a gross misdemeanor, often receives a suspended sentence of 365 days. If something in the judicially reviewable “record of conviction” such as the plea statement specifies that the assault involved the use or threat of force, it could be found an aggravated felony as a crime of violence.²⁹ So you could have an aggravated felony that is not a CIMT. Another example would be a conviction for Failure to Appear for a felony, where the original felony charge was dismissed or was not itself a CIMT. Such a conviction may be an aggravated felony,³⁰ but would not normally be considered to require evil intent or involve turpitude.

If this comes up in an Request For Evidence (RFE), Counsel may want to preserve a legal argument that INA § 204(a)(1)(C), in referencing “an act or conviction that is waivable with respect to the petitioner for purposes of a determination of the petitioner’s admissibility” necessarily should be read as though it said “an act or conviction that is waivable with respect to the petitioner

or for which no waiver is required for purposes of a determination of the petitioner’s admissibility.” The fact that § 204(a)(1)(C) is introduced by stating “[n]otwithstanding section 101(f)” supports this sensible interpretation. Otherwise an applicant would be in the absurd position of trying to argue that such conviction was really more reprehensible than it seems, in order qualify as a CIMT, so that it can be deemed “waivable.”

The scant legislative history of the GMC exceptions included in VAWA 2000 indicates that the Attorney General “is to take the same types of evidence into account” as for the INA § 237(a)(7) waiver for persons with DV convictions.³¹ This deals with the connection to the abuse, but does not say whether § 204(a)(1)(C)’s requirement that a waiver of inadmissibility be available for a GMC exception, subsumes or includes a scenario where a waiver of inadmissibility is not needed in the first place. Such an interpretation is more in the spirit of ameliorative provisions such as VAWA 2000’s §§ 1503(d) and 1504(a). Although § 204(a)(1)(C) seems to forgive *any* provision of § 101(f) that does not preclude adjustment of status, it is important to remember that § 101(f)(8) does on its face bar GMC to anyone with an aggravated felony “at any time.” While § 204(a)(1)(C) was both enacted later and is a more specific provision, advocates should be prepared to address such a counter-argument, if they wind up needing to argue this in the first place.³²

²⁸ *Matter of Sanudo*, 23 I. & N. Dec. 968 (BIA 2006) (relationship between perpetrator and victim does not automatically alter the offense so that it involves turpitude.). The case law of the BIA has been unusually consistent-- at least until now-- in holding that “simple assault does not normally involve moral turpitude.” *Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1996); *Matter of Short*, 20 I. & N. Dec. 136, 139 (BIA 1989).

²⁹ 8 U.S.C. § 1101(a)(43)(F) defines a crime of violence (as defined in 18 U.S.C. § 16) with a sentence of 1 year or more. For a non-felony, 18 U.S.C. § 16(a) 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 . . .”

³⁰ Under INA § 101(a)(43)(T) as “an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years’ imprisonment or more may be imposed . . .”

³¹ Congressional Record, S10192, October 11, 2000. (See INA § 237(a)(7)(A)(i)).

³² “As always, ‘[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.’ [internal citations omitted]” *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445

Good Moral Character (GMC) by Statute is Only Required in the Present. ³³

If an offense is within the three-year period on which the regulations focus and for which they require evidence,³⁴ but a sufficient connection to the abuse absolutely cannot be established, you may not have to give up. Only § 204(a)(1)(C) can set aside the permanent bar to GMC of § 101(f)(8)

(1987); “[A] more specific statute will usually control over a more general one A later enactment prevails over an earlier one as the later expression of legislative intent”; and: “[t]he subsequent enactment of a statute which treats a phase of the same general subject matter in a more minute way consequently repeals pro tanto the provisions of the general statute with which it irreconcilably conflicts.” 3A Sutherland Statutory Construction § 72:3 & 23:16 (6th ed.).

³³ “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.” 8 C.F.R. § 204.2(c)(1)(vii), referring to 8 U.S.C. § 1101(f). INA § 101(f) begins its list of negative factors with “For the purposes of this Act—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--” However, the statute governing self-petitions INA § 204(a)(i)(A)(iii)(II)(bb) does not specify a period for which good moral character is required to be established—just “ *is* a person of good moral character”—only the aggravated felony conviction bar specifically extends beyond “the period” to include a conviction “at any time.” INA § 101(f)(8). [emphasis added].

³⁴ “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.” 8 C.F.R. § 204.2(c)(2)(v).

arising from an aggravated felony conviction. But if the conviction was not an aggravated felony (and see above) and if the client has strong countervailing equities and a history that might overcome the presumption that he or she is not a person of GMC, he or she should not be statutorily barred from showing that he or she *is currently* of good moral character. The three year-period specified in 8 C.F.R.

§ 204.2(c)(2)(v) may establish a very strong presumption, but cannot read into the statute an absolute *per se* bar, that is not there. Because the statute establishes only a requirement that the applicant *be* of GMC, in the present tense, regulations and memoranda cannot entirely override the lack of statutory time period.

There is an older type of relief in the Immigration and Naturalization Act called Registry.³⁵ As in the case of a self-petitioner, Registry only requires that an applicant “is a person of good moral character”³⁶ In a 1991 case the BIA ruled that INS could not read a specific GMC period into the requirements.³⁷ INS tried to argue that the GMC period should date from arrival in the US, or at least for a five-year period.³⁸ The BIA held that, although an examination of past conduct was appropriate,

“the statutory language regarding suspension of deportation and voluntary departure specifically requires an applicant to establish that he ‘was and is’ a person of good moral character while

³⁵ INA § 249, 8 U.S.C. § 1259. Registry allows a person who has lived in the US since 1-1-1972 to apply for permanent residence.

³⁶ INA § 249(c), 8 U.S.C. § 1259(c).

³⁷ *Matter of Sanchez-Linn*, 20 I. & N. Dec. 362, 365 (BIA 1991).

³⁸ *Id.* at 364

registry only requires that a person establish that he 'is' a person of good moral character. In view of the specific language of the Act, a mandatory set period during which good moral character must be established prior to the filing of an application for registry cannot simply be grafted on to the requirements of section 249.³⁹

As the BIA contrasted Registry's GMC requirement with that of former, (pre-IIRIRA) relief like "suspension of deportation" and voluntary departure; so, under current law, so can the specific 'periodization' of the GMC requirement for 10-year and 3-year (VAWA) cancellation of removal, with the self-petition statute's current tense and lack of such a period be similarly analogized. Obviously, if there is a lack of a connection to abuse, and the offense is recent and within the three-year 'evidentiary period' it would be difficult to overcome the presumption that the § 101(f) criteria reasonably apply. But "[w]hat is a 'reasonable period of time' will vary depending on the specific facts of a case."⁴⁰ If the client has extraordinary or extenuating circumstances other than a connection to the abuse, such as solid evidence of more recent rehabilitation, life change, and other strong equities, then neither the lack of connection nor the recentness of the act or conduct should constitute a *per se* bar to showing GMC.

Discretionary Determinations For Self Petitioners With Criminal Convictions

GMC determination is at the discretion or judgment of the adjudicator.⁴¹ Various non-statutory standards exist that generally guide GMC determinations. With respect to the criminal grounds detailed above, even if the petitioner demonstrates that a waiver is available and the act or crime is "connected" to the battering or extreme cruelty, the adjudicator may still find that the conduct is severe enough and or the equities insufficient to warrant a favorable exercise of discretion necessary to find GMC. Any conduct that normally precludes a finding of GMC, even if the bar to GMC is waived, may weigh negatively on the final discretionary determination. In making a GMC determination, the adjudicator must weigh both "favorable and unfavorable factors."⁴² Any criminal conduct or conviction should be presumed to be a negative discretionary factor that will require the applicant to provide affirmative evidence that demonstrates that the offense(s) are outweighed by positive discretionary factors. Although there have been many changes in the law since it was issued, the BIA's decision in *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978) remains a useful guide for the kinds of factors to be considered and the process for weighing the positive factors against the negative factor(s) presented by criminal conduct and convictions when an adjudicator is exercising discretion.⁴³

³⁹ *Id.* at 365.

⁴⁰ *Id.*

⁴¹ See Yates Memo, *supra* note 2, at 4.

⁴² *De La Luz v. INS*, 713 F.2d 545 (9th Cir. 1983).

⁴³ See also *In re Mendez-Morales*, 21 I. & N. Dec. 296 (BIA 1996), discussing discretionary factors for a § 212(h)(1)(B) waiver.

Standard for Discretionary Determinations for Self-Petitioners

When Congress is silent about whether specific conduct triggers a bar to GMC, the issue of whether an individual is a person of GMC becomes an issue of fact.⁴⁴ The adjudicator has wide discretion, and the burden is on the petitioner to absolve any doubts about his or her character that may exist.⁴⁵ To begin with, a presumption that GMC is lacking exists for self-petitioners who have committed or been convicted of unlawful acts that adversely reflect upon his or her moral character, even where the acts do not trigger the automatic statutory GMC bars at INA § 101(f). In such cases, the self-petitioner must establish that there are sufficient positive equities that outweigh the negative impact of the criminal conduct or conviction.

Generally, there are two ways the adjudicator determines whether the self-petitioner's acts or convictions result in a denial of the requisite GMC:

Community Standards Test: In this test, courts consider whether a person is of good moral character according to the standards that exist in the community where the self-petitioner resides. Occasional mistakes may be considered acceptable by the standards of a community. For example, in *Petition for Naturalization of Odeh*, 185 F. Supp. 953 (E.D. Mich. 1960), the adjudicator found that under the circumstances of the case, receipt of 16 traffic tickets over the course of 21 months did not preclude a

finding of GMC. Negative conduct such as getting traffic tickets, while it has a negative bearing on moral character, is common in the community, and may be excused depending on the situation. It is enough for an individual to show that he or she has not transgressed the accepted understanding of appropriate conduct more often than usual.⁴⁶

Common Conscience Test: This standard is often applied when the noncitizen fails to establish that his or her conduct was acceptable within the community where he or she resides. Under this test, the adjudicator considers whether the common conscience of the country as a whole, if possible to ascertain, would look favorably upon the conduct in question.

Overcoming Negative Discretionary Factors arising From Criminal Conduct

Because the self-petitioner has the burden of proving GMC, and it is his/her responsibility to provide any evidence that may weigh favorably on the GMC determination. This may include, but is not limited to, the following:

- Provide evidence that the community and national standards would not look unfavorably upon the conduct, particularly in the circumstances in which it occurred.
- Evidence of a person's general good reputation in the community⁴⁷

⁴⁴ *In re Valad*, 465 F.Supp 120 (E.D. Va. 1979).

⁴⁵ *Nemetz v. INS*, 647 F.2d 432 (4th Cir. 1981); *In re Kovacs*, 476 F.2d 843 (2d Cir. 1973).

⁴⁶ *Posusta v. US*, 285 F.2d 533 (2d Cir. 1960).

⁴⁷ Although this is based on hearsay and not conclusive, it should be considered in the GMC

Online Resources

The Defending Immigrants

Partnership - DIP provides a wealth of resources to understand the immigration consequences of crimes. It has launched a free online resource for criminal defenders at <http://www.defendingimmigrants.org>.

Law Office of Norton Tooby publishes a comprehensive digest of holdings on different criminal grounds, including a list of CIMT decisions at a valuable, but paid membership site. <http://criminalandimmigrationlaw.com/~crimwcom/index.php>

The Immigration Advocates Network (IAN) is a free national online network that supports legal advocates working on behalf of immigrants' rights. <http://www.immigrationadvocates.org/>. IAN has materials, power-points, webinars, and training materials on crime-related issues.

The Immigrant Legal Resource Center in the Bay Area provides technical assistance and information on criminal-immigration issues and has a number of free online resources <http://www.ilrc.org/criminal.php>

National Immigration Project the National Immigration Project is a national membership organization of lawyers, law students, legal workers, and jailhouse lawyers working to defend and expand the rights of all immigrants in the United States. They have on-line resources and provide technical assistance <http://www.nationalimmigrationproject.org/CrimPage/CrimPage.html>

The **Washington Defender's Association Immigration Project** is mainly oriented toward Washington defense attorneys, but has some material of general use about immigration and criminal dispositions on-line, for example, on deferred adjudications. <http://www.defensenet.org/immigration-project/immigration-resources>

The Immigrant Defense Project (IDP), formerly an initiative of the New York State Defenders Association, has a number of east coast state quick reference crim-imm charts on-line, and other useful information and resources <http://www.immigrantdefenseproject.org/>

Getting Help on Your Case

Understanding the immigration consequences of your client's criminal conviction(s) or criminal history can, at first, appear daunting. In light of the complexities in trying to understand the immigration consequences of crimes, the ASISTA team includes Annie Benson and Jonathan Moore, two nationally recognized experts in the area of immigration law & crimes. They are available to provide individual technical assistance to you on your case.

For assistance on crime-related issues please contact:

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- **Annie Benson:** abenson@defensenet.org **360-385-2538**

UPCOMING EVENTS AND TRAININGS

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This publication is supported by Grant No. 2009TAAXK009 awarded by the United States Department of Justice, Office on Violence Against Women. The opinions, findings, and recommendations expressed in this document are those of the author(s) and do not necessarily reflect the views of the United States Department of Justice, Office on Violence Against Women.

