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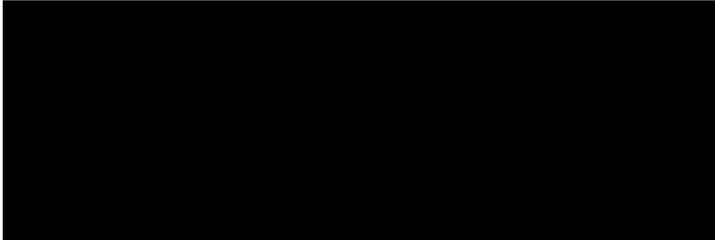
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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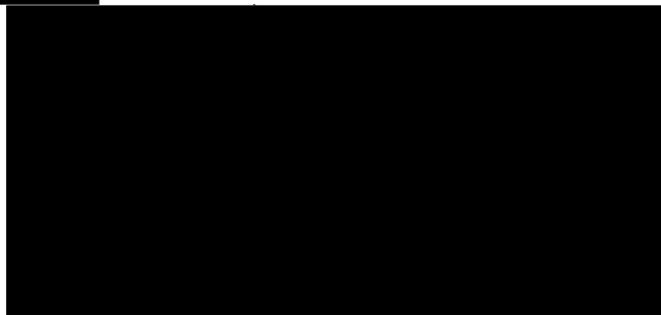


Office: VERMONT SERVICE CENTER

Date: DEC 12 2006

IN RE:

Petitioner:



PETITION: Petition for Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an immigrant pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

The director denied the petition because the petitioner did not establish her good moral character.

On appeal, counsel submits a brief.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States 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 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 paragraphs (2)(D), (6)(E), and (10)(A) of section 212(a) of this Act; or subparagraphs (A) and (B) of section 212(a)(2) . . . if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

* * *

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

Section 212(a)(2)(A) of the Act includes, "any alien convicted of . . . a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime."

Section 204(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . . , or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall

consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

The eligibility requirements are further 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 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.

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:

Evidence for a spousal self-petition –

(i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

* * *

(v) *Good moral character.* Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. . . . If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Mexico. On January 13, 1989, the petitioner attempted to enter the United States by presenting the birth certificate of another person, [REDACTED]. That same day, the petitioner signed a "Record of Sworn Statement in Affidavit Form," which reads, in pertinent part:

Being duly sworn, I make the following statement:

My true and correct name is [REDACTED] and I am a citizen of Mexico. I was born in Saptlanejo Jalisco on the twelve [sic] of January, 1962. . . . About four months [sic] in the airport that I worked in Jalisco I found the birth certificate belonging to [REDACTED]. I decided to used [sic] the birth certificate and try to enter into the United States. . . . The foregoing statement has been read to me in the Spanish language and I swear it is the whole truth.

Attached to the petitioner's sworn statement is a Notice of Rights and Waiver, which is printed in Spanish, signed by the petitioner, as [REDACTED] and dated January 13, 1989. This document states that the petitioner did not want an attorney at the time. The record contains a corresponding criminal complaint filed with the U.S. District Court for the Southern District of Texas, which charged the petitioner with attempted entry through misrepresentation in violation of section 275 of the Act.

On June 23, 1999, the petitioner again applied for admission to the United States by presenting the Texas birth registration card of another individual, [REDACTED]. The petitioner signed a sworn statement, in which she admitted her true name, date and place of birth, and that she attempted to enter the United States by presenting the U.S. birth registration card of Ms. [REDACTED]. The petitioner was consequently subject to expedited removal from the United States on June 24, 1999.

On November 8, 2000, the petitioner married F-L-¹, a U.S. citizen, in Texas. The petitioner filed this Form I-360 on March 17, 2003. The director subsequently issued a Request for Evidence (RFE) of, *inter alia*, the petitioner's good moral character, to which the petitioner responded by submitting her April 7, 2005 affidavit; clearance letters from the Texas Department of Public Safety, Harris County Texas District Court, the Pasadena Texas Police Department; and letters from twelve friends and acquaintances attesting to her good character. In her April 7, 2005 affidavit, the petitioner admitted that she was apprehended in 1999 for attempting to enter the United States by using another person's birth certificate, but the petitioner declared that she had "no other convictions."

On August 2, 2005, the director issued a Notice of Intent to Deny (NOID) the petition for lack of the requisite good moral character because the petitioner gave false testimony when attempting to enter the United States on January 13, 1989. The NOID informed the petitioner of the existence and pertinent assertions of the petitioner's January 13, 1989 sworn statement. In response, the petitioner submitted her September 2, 2005 affidavit in which she states, in pertinent part:

¹ Name withheld to protect individual's identity.

I forgot that I had been detained on January 13, 1989 for using a birth certificate belonging to another person. I forgot this because I confused this event with my June 23, 1999 arrest under similar circumstances. . . .

My memory has gotten worse because my abuser, [F-L-], used to hit me on the head That's probably why I confused those two events. . . .

In 1989 I was very scared when I was arrested at the border. When the guards asked me for my name, I told them the first name that came into my head. I don't know why I did this, I was just afraid and wanted to be released. People were shouting at us and threatening me with prison so I became very nervous. The guards asked me to sign papers that were all in English. I don't know what they said but I signed them so that I could leave. I don't remember having a lawyer or anyone to help me.

False Testimony

We concur with the director's determination that the petitioner gave false testimony for the purpose of obtaining a benefit under the Act, which prevents a finding of her good moral character pursuant to section 101(f)(6) of the Act. On appeal, counsel presents three reasons why the petitioner's 1989 statement does not bar a finding of her good moral character. As discussed below, counsel's arguments are unpersuasive.

First, counsel contends that the petitioner need only establish her good moral character during the three years preceding the filing of this petition and that because it was made well outside of this period, the petitioner's 1989 statement does not bar a finding of her good moral character. Counsel is misguided. The statute proscribes no time period during which the self-petitioner must demonstrate his or her good moral character. See Section 204(a)(1)(A)(iii)(II)(cc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(cc). While the regulation at 8 C.F.R. § 204.2(c)(2)(v) specifies a three-year span for police clearances and criminal background checks, the regulation does not limit the temporal scope of CIS's inquiry into the petitioner's moral character. The agency may investigate the self-petitioner's character beyond the three-year period when there is reason to believe that the self-petitioner lacked good moral character during that time. See Preamble to Interim Regulations, 61 Fed. Reg. 13061, 13066 (Mar. 26, 1996). The petitioner's January 13, 1989 sworn statement in her administrative record provided the director with reason to believe that the petitioner lacked good moral character at that time.

Second, counsel claims that the petitioner's 1989 statement "involved no element of requesting an immigration benefit" and thus does not fall within the ambit of section 101(f)(6) of the Act. Counsel asserts that because the petitioner admitted that she was a Mexican citizen and admitted presenting another individual's birth certificate in order to enter the United States, she "effectively

withdrew any request for an immigration benefit. Without US documents, her return to Mexico was inevitable." We disagree.

False testimony under section 101(f)(6) of the Act is limited to oral statements made under oath with the subjective intent of obtaining immigration benefits. *Kungys v. United States*, 485 U.S. 759, 780 (1988). The false testimony need not be material and does not include misrepresentations made for reasons other than obtaining immigration benefits, such as statements made out of embarrassment, fear or a desire for privacy. *Id.*

The relevant false statements made by the petitioner under oath on January 13, 1989 were her name, date and place of birth. In her September 2, 2005 affidavit, the petitioner states that she told the guards the first name that came into her head. She explains, "I don't know why I did this, I was afraid and wanted to be released." The petitioner further states that she signed the "papers" so that she "could leave." These statements indicate that the petitioner gave a false name in order to be released from immigration custody under former 8 U.S.C. § 1252 (1990). In addition, we cannot ignore the fact that by giving a false name, date and place of birth, the petitioner avoided creating a record of deportation under her true identity, which would have rendered her excludable under former 8 U.S.C. §§ 1182(a)(16), 1182(a)(17) (1990). Accordingly, the benefits under the Act sought by the petitioner's false testimony were release from immigration custody and, possibly, the ability to be admitted to the United States at a future date.

Relevant authority further discounts counsel's claim that the petitioner's admission of her Mexican citizenship and use of another person's birth certificate effectively withdrew her request for an immigration benefit. In *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973), the Board of Immigration Appeals (BIA) held that the alien respondent's false statements under oath to a border patrol agent constituted false testimony under section 101(f)(6) of the Act. In that case, the alien was driven across the border from Canada into the United States by another individual, was not inspected, but was later apprehended by the border patrol. *Matter of Namio*, 14 I&N Dec. at 413. The alien falsely stated that he traveled to Montreal alone, hitchhiked into the United States and did not know when he entered the United States. *Id.* The alien pled and was found guilty of entering the United States without presenting himself for inspection. *Id.* Although the alien's statements in *Namio* effectively prevented him from obtaining the immigration benefit of lawful entry into the United States, as counsel claims the petitioner's statements did here, the BIA nonetheless found that his statements were made for the purpose of obtaining immigration benefits and constituted false testimony under section 101(f)(6) of the Act. *Id.* at 413-414. See *Bufalino v. Holland*, 277 F.2d 270, 276 (3rd Cir. 1960) (alien gave false testimony under section 101(f)(6) of the Act when he purposely misstated his birth place, birth date and absences from the United States in deportation proceedings). In this case, the petitioner's misrepresentations of her name, date and place of birth in a sworn statement to an immigration officer preceding her prosecution for violation of section 275 of the Act also constitute false testimony under section 101(f)(6) of the Act.

Counsel's third claim is that the petitioner "used a false name out of fear and not with any dishonest intent to obtain a benefit by deceiving the INS." The Supreme Court has held that section 101(f)(6) of the Act "applies to only those misrepresentations made with the subjective intent of obtaining immigration benefits" and does not include "[w]illful misrepresentations made for other reasons, such as embarrassment, fear, or a desire for privacy[.]" *Kungys*, 485 U.S. at 780. The evidence in this case does not establish that the petitioner's motivations for making her false statements in 1989 fall within the scope of "other reasons" referred to by the Court in *Kungys*. In her September 2, 2005 affidavit, the petitioner states that she was "very scared" when she was arrested at the border in 1989, that she does not know why she gave a false name, but that she "was just afraid and wanted to be released." The petitioner further states that "[p]eople were shouting at us and threatening me with prison so I became very nervous." The petitioner's testimony indicates that she gave a false name and signed the sworn statement because she wanted to be released from detention and, perhaps, avoid a record of deportation which would render her excludable. Fear of suffering adverse immigration consequences may well be inherent in false testimony under section 101(f)(6) of the Act, but such fear does not fall within the exception referred to by the Court in *Kungys*. See *Liwanag v. I.N.S.*, 872 F.2d 685, 689 n.5 (5th Cir. 1989) (where alien claimed he lied out of fear, but acknowledged that he lied to protect his lawful permanent resident status, such fear was "obviously not 'the fear' referred to in *Kungys*").

Crimes Involving Moral Turpitude

The petitioner is also unable to establish her good moral character because she was convicted of two crimes involving moral turpitude. The record shows that the petitioner was twice convicted of attempting to enter the United States through misrepresentation in violation of section 275(a) of the Act. On January 17, 1989, the U.S. District Court, Southern District of Texas, found the petitioner guilty of knowingly and willfully attempting to gain illegal entry in the United States by presenting a birth certificate in the name of [REDACTED]. On June 24, 1999, the same court found the petitioner guilty of knowingly and willfully attempting to gain illegal entry into the United States by presenting a birth certificate in the name of [REDACTED].

The petitioner's conduct in both cases was fraudulent because her misrepresentations were both knowing and willful. See *Black's Law Dictionary* 670, Bryan A. Garner ed., 7th ed. (West 1999) (defining fraud as "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."). Offenses involving fraud fall squarely within the jurisprudential definition of crimes involving moral turpitude. *Jordan v. De George*, 341 U.S. 223, 232 (1951); *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992) ("Fraud, as a general rule, has been held to involve moral turpitude."); *Matter of Correa-Garces*, 20 I&N Dec. 451, 454 (BIA 1992) ("Crimes involving fraud are considered to be crimes involving moral turpitude."). Accordingly, the petitioner is an alien described in section 212(a)(2)(A) of the Act and we are further barred from finding her to be a person of good moral character pursuant to section 101(f)(3) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii).

Section 204(a)(1)(C) of the Act Does Not Apply

The petitioner also does not come within the purview of section 204(a)(1)(C) of the Act, which provides CIS with the discretion to find a petitioner to be a person of good moral character if: 1) the petitioner's act or conviction is waivable for the purposes of determining admissibility or deportability under section 212(a) or section 237(a) of the Act; and 2) the conviction was connected to the alien's battery or subjection to extreme cruelty by his or her U.S. citizen or lawful permanent resident spouse or parent. Section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C). Although inadmissibility due to fraud or misrepresentation (under section 212(a)(6)(C)(i) of the Act) and conviction for a crime involving moral turpitude is waivable for self-petitioners under sections 212(i)(1) and 212(h)(1)(C) of the Act respectively, the record is devoid of any evidence that the petitioner's acts and convictions were connected to her battery or subjection to extreme cruelty by her U.S. citizen husband. The petitioner married her husband on November 8, 2000, over 12 years after her 1989 conviction and nearly a year and a half after her 1999 conviction. The earliest evidence of abuse dates from 2001 and the petitioner's testimony includes no mention of her husband's battery or extreme cruelty before that date. We are consequently unable to find the petitioner to be a person of good moral character as a matter of discretion pursuant to section 204(a)(1)(C) of the Act.

Counsel's Procedural Claims

Counsel further claims that the petitioner was denied due process when the director failed to address counsel's arguments made in response to the NOID. However, counsel has made the same arguments on appeal, all of which have been addressed in our foregoing discussion. Moreover, counsel has not shown that the petitioner suffered "substantial prejudice" as a result of the director's action. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case.

Counsel's final contention is that the director violated the petitioner's "right to see the information being used against her" by not providing her with a copy of her 1989 sworn statement pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i). Counsel misreads the regulation in two aspects. First, the regulation at 8 C.F.R. § 103.2(b)(16)(i) only pertains to "Derogatory information *unknown* to petitioner or applicant" (emphasis added). In her September 2, 2005 affidavit, the petitioner states that she was arrested at the border and detained on January 13, 1989 for using a birth certificate belonging to another person and that she signed "some papers." Hence, the petitioner clearly knew of her January 13, 1989 statement. Second, the regulation does not require that the petitioner be given a copy of the derogatory information. Rather, the regulation only requires that the petitioner "shall be advised" that an adverse decision will be made based on derogatory information considered by CIS and offered an opportunity to rebut the information and present information on her behalf before the decision is rendered. 8 C.F.R. § 103.2(b)(16)(i). The director's NOID complied with the regulation by informing the petitioner of the existence of and the pertinent false assertions made in her January 13, 1989 sworn statement.

The record fails to establish that the petitioner is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act. The petitioner is consequently ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act and her petition must be denied.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.