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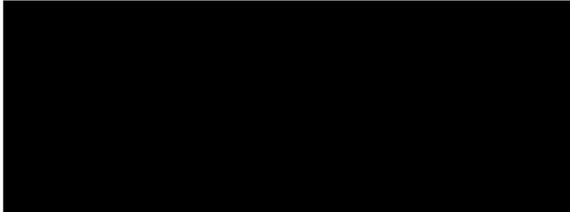
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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B-9



FILE: [Redacted]
EAC 04 146 53250

Office: VERMONT SERVICE CENTER

Date: JUL 27 2007

IN RE: Petitioner: [Redacted]

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.

Maura Deadrick
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Vermont Service Center Director 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 is a native and citizen of Mexico who seeks immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by his United States citizen spouse.

The director denied the petition because the petitioner failed to establish that he is a person of good moral character.

On appeal, counsel submits a statement and copies of documents previously submitted below.

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 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.

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

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* * *

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in . . . 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

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.”

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 who states in these proceedings that he entered the United States on February 7, 1993. On January 25, 2001, the petitioner married S-B¹, a U.S. citizen, in Colorado.² S-B-

¹ Name withheld to protect individual’s identity.

² Counsel claims that the petitioner and his wife “were living together in a common law relationship as recognized by the State of Colorado since February, 1999.” Regardless of the date, the legal validity of the petitioner’s marriage before this petition was filed is undisputed.

filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf, which was denied on August 15, 2002 due to abandonment. The petitioner filed this Form I-360 on April 12, 2004. On August 12, 2005, the director issued a Notice of Intent to Deny (NOID) the petition for lack of the requisite good moral character. The petitioner, through counsel, timely responded with additional evidence. On December 1, 2005, the director denied the petition for lack of the requisite good moral character and counsel timely appealed.

On appeal, counsel claims that the director did not consider the petitioner's application for a waiver of inadmissibility under section 212(h)(1)(B) of the Act. We concur with the director's determination and we have no jurisdiction to adjudicate the petitioner's waiver application in these proceedings.

The Petitioner's Criminal Offenses

The petitioner submitted a letter dated December 1, 2003 from the City of Lakewood, Colorado Police Department which states that the petitioner has a record of:

- June 11, 1998 Shoplifting Unlawful
- August 16, 1998 Failure to Appear – Warrant – Shoplifting Unlawful
- November 28, 1999 Failure to Pay Fine and Costs – Warrant – No Insurance – Adams County
- March 9, 2003 Shoplifting Unlawful

The petitioner also submitted a copy of a "Docket Worksheet," which states that the petitioner was charged with shoplifting and failure to appear on April 26, 2002 and was sentenced to pay two fines. Further, the petitioner submitted a letter from the Lakewood Municipal Court dated February 19, 2004, which states that the court only retains records for three years plus the current year after disposition of a case. The letter thus indicates that the court does not have complete records of the petitioner's offenses.

Despite the incomplete documentation of the petitioner's offenses, counsel concedes that the petitioner "was convicted twice of misdemeanor retail theft. . . . For both incidences, [the petitioner] was charged and pled guilty to misdemeanor retail theft and paid a fine." In his undated affidavit discussing his offenses, the petitioner states that in 1998 he went to a store with his cousin and when his cousin gave him a green tape to hold, the petitioner thought the tape belonged to his cousin. However, the petitioner and his cousin were stopped as they were leaving. The police came and the petitioner was given a ticket. The petitioner explains that he did not speak or understand English at that time and did not understand what was happening. The petitioner states, "At the end, I plead guilty and paid the \$200 dollar fine." In 2003, the petitioner states that he went to Home Depot with some co-workers and asked one of them for a tape measure and put the tape in his pack because he thought it belonged to his co-worker. The petitioner reports that the police came and asked them about the tape measure and he told the police he was innocent and did not do anything intentionally. The petitioner states, "They gave me a fine of \$75 dollars because of the tape measure." The record thus indicates that the petitioner was twice found to have committed shoplifting.

Crimes of Moral Turpitude

The term “crime involving moral turpitude” is not defined in the Act or the regulations, but has been part of the immigration laws since 1891. *Jordan v. De George*, 341 U.S. 223, 229 (1951) (noting that the term first appeared in the Act of March 3, 1891, 26 Stat. 1084). The Board of Immigration Appeals (BIA) has explained that moral turpitude “refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Matter of Franklin*, 20 I&N Dec 867,868 (BIA 1994), *aff’d*, 72 F.3d 571 (8th Cir. 1995). The BIA has also explained that “[t]he test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind. An evil or malicious intent is said to be the essence of moral turpitude.” *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980) (internal citations omitted).

When determining whether a crime involves moral turpitude, the statute under which the conviction occurred controls. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989). If the statute defines a crime “in which turpitude necessarily inheres,” then a conviction under that statute constitutes a crime involving moral turpitude. *Id.* In this case, turpitude is inherent in the *mens rea* of the statute of conviction. Section 9.64.010 of the Lakewood, Colorado Municipal Code states:

Shoplifting-Unlawful.

It is unlawful for any person to knowingly conceal or otherwise carry away, or to knowingly aid another to conceal or otherwise carry away, unpurchased goods, wares or merchandise owned or held by and offered or displayed for sale by any store or other mercantile establishment with the intent to avoid payment thereof and to permanently deprive the store or mercantile establishment of the benefit of the unpurchased goods, wares or merchandise; provided, however, that the aggregate value of such unpurchased goods, wares, or merchandise shall be less than five hundred dollars.³

Accordingly, the petitioner’s offenses are crimes of moral turpitude. *Farrell-Murray v. I.N.S.*, 992 F.2d 1222 (table), 1993 WL 141128 at *2 (10th Cir. 1993) (alien’s shoplifting offenses were crimes of moral turpitude). *See also Matter of Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974) (“It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude.”); *Matter of De La Nues*, 18 I&N Dec. 140, 145 (BIA 1981) (“Burglary and theft or larceny, whether grand or petty, are crimes involving moral turpitude.”).

The petitioner states that he did not intentionally steal any merchandise and pled guilty and paid the fines because he did not understand English (in 1998) and did not want to have any problem (in 2003). However, we lack the authority to look behind the petitioner’s dispositions and reassess his guilt or innocence. *In Re. Calvo*, 21 I&N Dec. 323, 327 (BIA 1996). *See also*

³ Lakewood, Colorado Municipal Code, available at: <http://www.lakewood.org/index.cfm?&include=/CC/CityCode/Title09/Chapter%209.64.cfm> (accessed July 6, 2007).

Trench v. I.N.S., 783 F.2d 181, 183 (10th Cir. 1986) (alien admitted committing offenses on his rap sheet and could not collaterally attack the legitimacy of his state criminal convictions in deportation proceedings).

The record shows that the petitioner was convicted of shoplifting in 2002 and counsel and the petitioner concede that the petitioner pled guilty to a second shoplifting offense in 2003. The petitioner's offenses are crimes involving moral turpitude and bar a finding of his good moral character pursuant to section 101(f)(3) of the Act.

Waiver and Discretionary Determination of Good Moral Character are Inapplicable

In response to the NOID, counsel conceded that the petitioner was convicted for two crimes of moral turpitude, but asserted that the petitioner was eligible for a waiver of inadmissibility under section 212(h)(1)(B) of the Act. We lack jurisdiction to consider the petitioner's waiver request. Waivers of inadmissibility are adjudicated when an alien seeks admission to the United States. The instant petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act involves no admissibility determination. There is also no application for adjustment of status before us.⁴ However, we note that the petitioner may request a waiver of inadmissibility under section 212(h)(1)(B) of the Act before an immigration judge if he is placed in removal proceedings under section 240 of the Act.

The petitioner is also ineligible for a discretionary determination of good moral character pursuant to section 204(a)(1)(C) of the Act. This provision provides Citizenship and Immigration Services (CIS) with the discretion to find a petitioner to be a person of good moral character if: 1) the petitioner's conviction for a crime involving moral turpitude 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 a conviction for a crime involving moral turpitude is waivable under section 212(h)(1) of the Act, the record does not indicate any connection between the petitioner's convictions and the battery or extreme cruelty of his wife. Accordingly, we are 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.

The record shows that the petitioner has committed two crimes of moral turpitude. The petitioner has consequently failed to demonstrate that he is a person of good moral character, as required by section 204(a)(1)(A)(II)(bb) of the Act. Accordingly, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act and his petition must be denied.

⁴ The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO only has jurisdiction over adjustment applications "when denied solely because the applicant failed to establish eligibility for the bona fide marriage exemption contained in section 245(e) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(JJ) (as in effect on February 28, 2003).