

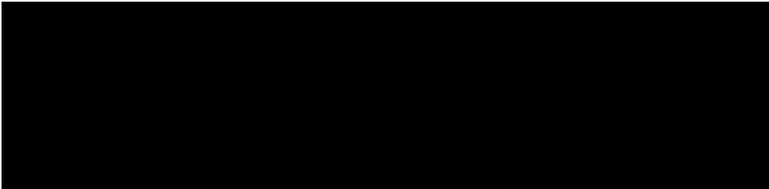
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U.S. Citizenship  
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAY 10 2007  
EAC 05 209 53125

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:

SELF-REPRESENTED

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 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 immigrant classification under 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 that her husband subjected her or any of her children to battery or extreme cruelty during their marriage, that she resided with her husband and that she was a person of good moral character.

On appeal, the petitioner submits additional evidence.

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:

(v) *Residence.* . . . The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser . . . in the past.

(vi) *Battery or extreme cruelty.* For the purpose of this chapter, the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but

that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner's marriage to the abuser.

(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.

\* \* \*

(iii) *Residence.* One or more documents may be submitted showing that the self-petitioner and the abuser have resided together . . . . Employment records, utility receipts, school records, hospital or medical records, birth certificates of children . . . , deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to

establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

(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 facts and procedural history. The petitioner is a native and citizen of Mexico, who states on the instant Form I-360 that she entered the United States without inspection in October 1985. On July 9, 1988, the petitioner married M-H<sup>1</sup>, a U.S. citizen. The former couple has five children. The petitioner's husband filed a Form I-130, Petition for Alien Relative, on her behalf, which was approved on July 30, 1993. The petitioner filed this Form I-360 on July 11, 2005. The director subsequently issued a Request for Evidence (RFE) of, *inter alia*, the requisite battery or extreme cruelty, joint residence and good moral character. The petitioner timely responded with additional evidence. The director then issued a Notice of Intent to Deny (NOID) the petition for lack of the requisite battery or extreme cruelty, joint residence and good moral character. The petitioner did not respond to the NOID. The director denied the petition on August 31, 2006 on the grounds cited in the NOID and the petitioner timely appealed.

On appeal, the petitioner submits evidence which demonstrates that she resided with her husband. The petitioner also submits evidence which, combined with an examination of the record, the relevant statutory sections of the Act and binding judicial authority, also shows that the petitioner is a person of good moral character. However, we concur with the director's determination that the petitioner failed to establish that her husband subjected her or any of her children to battery or extreme cruelty during their marriage. The relevant evidence submitted on appeal fails to overcome this ground for denial.

#### *Joint Residence*

On the Form I-360, the petitioner states that she lived with her husband from January 1986 until October 1998 and that an address in West Hills, California was their last joint residence. The petitioner submitted no supporting evidence of the former couple's joint residence below. On appeal, the petitioner submits copies of: a letter dated February 7, 1991 from the Valley Housing Assistance

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<sup>1</sup> Name withheld to protect individual's identity.

Payments Program, which is jointly addressed to the petitioner and her husband; a residential lease and related document signed by the landlords on February 6, 1991 and by the petitioner and her husband as joint tenants on January 17, 1991; a residential lease and lease addendum and a Section 8 Certificate of Family Participation signed by the landlord and by the petitioner and her husband as joint tenants in January 1989; and a City of Los Angeles Section 8 Housing Assistance Payments Program Certificate of Family Participation signed by the Field Office Manager and by the petitioner and her husband as joint tenants on January 11, 1989. These documents establish that the petitioner resided with her husband, as required by section 204(a)(1)(A)(iii)(II)(dd) of the Act.

*Battery or Extreme Cruelty*

The record contains the following evidence relevant to the petitioner's claim of battery or extreme cruelty:

- The petitioner's February 18, 2006 statement submitted below and her September 29, 2006 statement submitted on appeal;
- Affidavit of the petitioner's eldest daughter, [REDACTED], submitted on appeal;
- Printout from Northridge, California Hospital Medical Center showing that the petitioner was admitted to the hospital on seven occasions between 1989 and 2000, submitted on appeal;
- An Emergency Protective Order (EOP) issued against the petitioner's husband for the protection of the petitioner and her children on September 26, 1998; and
- Copy of a Los Angeles, California Police Department Preliminary Investigation Report, which is signed by the petitioner as the person reporting a crime, but on which all other identifying information is illegible.

In her February 18, 2006 statement, the petitioner reports that her husband first abused her in 1986. The petitioner explains, "I was a minor then and scared to death to complaint [sic] to the police against him of his reactions [sic]. Therefore I was scared to death that they would take my daughter away from me and I was illegal in this country." The petitioner states:

I kept suffering abuse through the years . . . . My children used to tell me to leave him for good, then on October 1998 I decided to leave him. I had another physical and sexual abuse and my little ones witnessed this incident. My children were little and testified against my husband and he was arrested. I was then translated [sic] to the Northridge Hospital in which the hospital run [sic] some tests and examinations for an evaluation report. My husband was in jail for only a period of 48 hours because I withdraw [sic] the charges. My children begged me to withdraw the complaint so they wouldn't suffer to see their dad in jail.

The EOP application states that on September 26, 1998, the petitioner's husband struck her in the face, pulled her into a room and forced himself upon her and that the petitioner then reported the incident to the police and was taken to Northridge Hospital. The EOP appears to have been granted ex-parte and expired on October 2, 1998. In the RFE and NOID, the director requested the petitioner to submit

documentation of the final outcome of the EOP case. The petitioner failed to do so and does not submit such evidence on appeal. The police report submitted with the EOP is a form document with blanks that appear to have been filled in with handwriting, but are illegible except for the petitioner's signature. Accordingly, the police report is of no probative value.

In the NOID, the director asked the petitioner to submit copies of the medical reports from Northridge Hospital relating to the September 26, 1998 incident. The petitioner did not respond to the NOID. In her September 29, 2006 statement submitted on appeal, the petitioner explains, "I went to the Northridge Hospital to request records to send them to your office, but they require a subpoena from INS and they refused to give them to me."

On appeal, the petitioner also submits a printout from Northridge Hospital, which confirms that she was admitted to the hospital on September 26, 1998, but provides no other, probative information. The printout lists six other admissions of the petitioner to the hospital on June 15, July 17 and July 23, 1989; April 19, 1996 and July 16 and 19, 2000. The record indicates that the July 17, 1989 admission corresponds to the birth of the petitioner's daughter, [REDACTED] on July 18, 1989. The petitioner does not state the reason for her admission to the hospital on the other four occasions and she does not discuss any particular incidents of abuse that correspond to those admission dates.

The testimony of the petitioner's eldest daughter, [REDACTED] also fails to fully support the petitioner's claim. [REDACTED] states that in 1991, when she was five years old, she remembers an incident where her parents were fighting and her father pushed the petitioner into the wall and the petitioner lost consciousness. [REDACTED] reports that the police came, paramedics took the petitioner to the hospital, but her father was not arrested. [REDACTED] states that her mother stayed in the hospital for a couple of days and that when her mother regained consciousness, she did not remember what had happened.

[REDACTED] also describes an incident in 1993 when her father became angry with the petitioner and hit her face very hard in front of [REDACTED] and her sisters. [REDACTED] states that she remembers several occasions where her father hit and hurt the petitioner in front of her and her sisters and she indicates that her father also frightened and verbally abused the whole family on other, unspecified occasions. However, [REDACTED] only describes the 1991 and 1993 incidents in detail.

The petitioner herself does not discuss any incidents of abuse that occurred in 1991 and 1993, as described by her daughter. The record is also devoid of any hospital records corresponding to the 1991 and 1998 incidents, except for the Northridge Hospital printout that shows the petitioner was admitted to the hospital for an unspecified reason on September 26, 1998 and released that same day. On appeal, the petitioner explains that she was unable to obtain her medical records from Northridge Hospital because they would only release the records if served with a subpoena. The petitioner also submits a letter from "Medical Record Department," which states that records from the Children's Assault Treatment Services can only be copied in response to a criminal subpoena, for the police detective investigating the case or for an advocate of Children and Family Services. In her February 18, 2006 statement, the petitioner states that her children "testified against" her husband. While the records

relating to their testimony may be unobtainable, as indicated by the "Medical Record Department" letter, the petitioner submits no evidence or a sufficient explanation of why her own medical records relating to the September 26, 1998 incident are unavailable.

On appeal, the petitioner also fails resolve the discrepancies between her daughter's affidavit and her own testimony. The petitioner's daughter, [REDACTED] describes two specific incidents of abuse that occurred in 1991 and 1993. [REDACTED] states that in 1991, the police were called and the petitioner was taken to the hospital. Although [REDACTED] reports that her mother lost consciousness and did not remember the precipitating events upon regaining consciousness, the petitioner does not discuss her hospitalization or any injuries in 1991. The petitioner also does not submit the corresponding police and medical records from the 1991 incident. While the petitioner states that she was unable to obtain records from Northridge Hospital, the record indicates that at the time of the 1991 incident, the petitioner was living in Van Nuys, not Northridge, California. The petitioner also fails to discuss the 1993 incident described by her daughter.

In her testimony, the petitioner indicates that she was abused by her husband for years, but describes only the September 26, 1998 incident in detail. The corresponding police report is illegible. The EOP confirms that the petitioner reported her husband's abuse on this date, but the petitioner failed to submit the final outcome of the protective order case. The petitioner states that she withdrew the charges and complaint against her husband because her children did not want him to go to jail, but she does not submit documentary evidence to corroborate her statements and does not indicate that such records are unavailable. The petitioner also fails to discuss two specific incidents of abuse described by her daughter as occurring in 1991 and 1993. On appeal, the petitioner does not explain the discrepancies between her and her daughter's statements. Accordingly, the record does not demonstrate that the petitioner's husband subjected her to battery or extreme cruelty during their marriage.

The evidence also does not establish that, during their marriage, the petitioner's husband subjected any of their children to battery or extreme cruelty. The petitioner and [REDACTED] indicate that the children were "verbally abused" and "frightened" by the petitioner's husband and that they "suffered tremendously" because of his actions. The petitioner and [REDACTED] also state that the petitioner's children witnessed numerous incidents of spousal abuse. However, the petitioner and her daughter do not provide detailed, probative accounts of specific incidents of battery or extreme cruelty that the petitioner's husband inflicted directly upon her children. The record also does not contain sufficient evidence regarding the children's observation of the 1998 incident (or any other incidents of spousal abuse) to establish that the petitioner's husband subjected the children to extreme cruelty by causing them to witness his abuse of their mother.

The record thus fails to establish that the petitioner's husband subjected her or any of her children to battery or extreme cruelty during their marriage, as required by section 204(a)(1)(A)(iii)(I)(bb) of the Act.

*Good Moral Character*

The director determined that the petitioner was not a person of good moral character, in part, because she did not provide evidence of the final disposition of her arrest and the relevant excerpts of law. Evidence submitted on appeal, combined with an examination of the relevant criminal law, shows that the petitioner's conviction does not bar a finding of her good moral character.

The petitioner submitted a report from the California Department of Justice Bureau of Criminal Identification and Information, which states that the petitioner was convicted of misdemeanor theft on August 11, 1999. On appeal, the petitioner submits the docket sheet from the Municipal Court of Van Nuys, Los Angeles County, California (Case Number [REDACTED]), which states that the petitioner was charged with committing burglary and theft on or about July 16, 1999. On August 11, 1999, the court dismissed the burglary charge and the petitioner waived her right to counsel and pled nolo contendere to the theft charge. The court found the petitioner guilty and convicted her of theft in violation of section 484(A) of the California Penal Code. The court sentenced the petitioner to one day in jail with credit for one day served, placed her on summary probation for one year, ordered her to perform 10 days of "Cal Trans" and pay a restitution fine of \$100. The petitioner paid the fine on August 11, 1999 and on September 22, 1999, the petitioner filed proof of her completion of "Cal Trans" and the proceedings were terminated.

The record shows that the petitioner's conviction arose from her shoplifting of goods valued at \$298. Accordingly, under California law, the petitioner was convicted of petty theft. Cal. Penal Code Ann. §§ 486-88 (West 1999). In California, petty theft is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or both. Cal. Penal Code Ann. § 490 (West 1999).

Petty theft is a crime involving moral turpitude. *U.S. v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9<sup>th</sup> Cir. 1999). An alien's conviction for a crime involving moral turpitude generally bars a finding of his or her good moral character pursuant to section 101(f)(3) of the Act. However, section 212(a)(2)(A)(ii)(II) of the Act provides that an alien will not be considered to have been convicted of a crime involving moral turpitude if the maximum penalty possible for the crime did not exceed imprisonment for one year, the alien was not sentenced to a term of imprisonment in excess of six months and the alien committed only one crime of moral turpitude. Section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

In this case, the record indicates that the 1999 offense is the petitioner's only conviction. The maximum possible penalty for the petitioner's offense did not exceed one year and the petitioner was sentenced to only one day in jail. Accordingly, the petitioner's conviction falls within the exception at section 212(a)(2)(A)(ii)(II) of the Act and does not bar a finding of her good moral character.

The director also determined that the petitioner was not a person of good moral character because she falsely declared under penalty of perjury on Part 3(1)(b) of her Form I-485, Application to Adjust

Status, that she had never “been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations.” The petitioner made this same false attestation on both the Form I-485 filed on July 11, 2005 in conjunction with the present Form I-360 and on a prior Form I-485, which she signed on March 12, 1999 and filed on March 22, 1999.

The regulation at 8 C.F.R. § 204.2(c)(1)(vii) prescribes that a self-petitioner will 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 . . . although the acts do not require an automatic finding of lack of good moral character.” Federal law penalizes anyone who, under penalty of perjury, knowingly subscribes as true any false statement with respect to a material fact in an immigration-related application or who knowingly presents an immigration-related application that contains any such false statement. 18 U.S.C. § 1546(a)(2007).

Although the petitioner clearly lied on both her Forms I-485, her false statements were not material to her adjustment applications under binding judicial precedent and thus do not bar a finding of her good moral character in this case. When determining materiality for purposes of inadmissibility due to misrepresentation of a material fact, the U.S. Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arose, has adopted the standard set forth by the Supreme Court in *Kungys v. United States*, 485 U.S. 759, 772 (1988). *Forbes v. I.N.S.*, 48 F.3d 439, 442-43 (9<sup>th</sup> Cir. 1995). In *Kungys*, the court held (in the context of denaturalization under 8 U.S.C. § 1451(a)) that a concealment or misrepresentation is material if it has a “natural tendency to influence the decisions of the Immigration and Naturalization Service.” *Kungys*, 485 U.S. at 772. Although the majority of the *Kungys* court did not hold that the government must show that the misrepresentation or concealment would have resulted in a negative determination of the alien’s eligibility, the Ninth Circuit has adopted Justice Brennan’s conclusion, in his concurring opinion, that the government must still “produce evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed.” *Forbes*, 48 F.3d at 443 (quoting *Kungys*, 485 U.S. at 783 (Brennan, J., concurring)).

In *Forbes*, the alien answered no to a question on his visa application, which asked, “Have you ever been arrested, convicted or confined in a prison, or have you ever been placed in a poorhouse or other charitable institution? (If answer is Yes, explain).” *Id.* at 441. In fact, the petitioner had been arrested on a criminal charge which remained pending at the time he completed his visa application, although the charge was dismissed two years after his visa was issued. *Id.* at 440-41. The Ninth Circuit held that the alien’s misrepresentation was not material because the government was unable to show that a statutory disqualifying fact existed at the time the visas were issued because the consular officer would not have denied the alien’s visa application, but would have held it in abeyance pending the resolution of the criminal charge against the petitioner. *Id.* at 443.

In this case, the record also contains no evidence that a statutory disqualifying fact exists because the petitioner’s sole conviction for petty theft falls within the petty offense exception and does not bar a finding of her good moral character pursuant to section 101(f) of the Act.

The regulation at 8 C.F.R. § 204.2(c)(2)(v) prescribes that “[p]rimary evidence of the self-petitioner’s good moral character is the self-petitioner’s affidavit” and that CIS “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” when the petitioner has explained that police clearances are unavailable.

On appeal, the petitioner states, in reference to her conviction, “I know that this looks bad on my records. This arrest was a misdemeanor and I completed everyting [sic] that [the] court required. Since then I have not have [sic] any arrest and I have tried to work very hard to support my five children.” On appeal, the petitioner also submits an affidavit from her friend, [REDACTED], who states that he has known the petitioner since 1985 and attests to her good character.

The petitioner’s single conviction falls within the petty offense exception at section 212(a)(2)(A)(ii)(II) of the Act and does not bar a finding of her good moral character. The petitioner’s false attestations on her Form I-485 applications are also not disqualifying because the misrepresentations were not material under binding court precedent. The petitioner has submitted evidence in compliance with the evidentiary requirements of 8 C.F.R. § 204.2(c)(2)(v) and has demonstrated that she is a person of good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

While the petitioner has established on appeal that she resided with her husband and that she is a person of good moral character, she has not demonstrated that her husband subjected her or any of her children to battery or extreme cruelty during their marriage. 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.