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U.S. Citizenship
and Immigration
Services

B9

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: **SEP 21 2007**

EAC 06 225 50680

IN RE:

Petitioner: [Redacted]

PETITION:

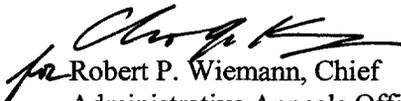
Petition for Immigrant Battered Spouse Pursuant to Section 204(a)(1)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

[Redacted]

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien subjected to battery or 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.

The petitioner, through counsel, timely appealed.

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).

The evidentiary standard and guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are contained 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 regulation at 8 C.F.R. § 204.2(c)(1)(vii) further explicates the good moral character requirement and states, in pertinent part:

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 –

* * *

(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 petitioner, who is a native and citizen of Algeria, entered the United States on September 28, 2000 as a nonimmigrant student (M-1) to attend Bourland Flight Academy. The petitioner admits that he did not attend the flight academy but instead went to reside with his family. On August 30, 2002, the petitioner married J-H-¹, a United States citizen, in Indiana. J-H- filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf on January 29, 2003. On February 25, 2003, the petitioner was issued a Notice to Appear (NTA) and placed in removal proceedings. The Form I-130 was approved on May 7, 2003. On October 1, 2003, the petitioner pled guilty to a violation of 18 U.S.C. § 1001(a)(2), False Application for a Social Security Card,² and was sentenced to six months of imprisonment and two years of probation.³ On January 20, 2005, the petitioner pled guilty to a violation of section 35-42-2-1 of the Indiana Statute Annotated, Battery,⁴ and received a one-year suspended sentence, one year of probation, and was ordered to pay a fine and court costs. The petitioner filed a prior Form I-360 on September 29, 2005. The petitioner and his spouse were divorced on October 4, 2005.⁵ The prior petition was denied on March 7, 2006.

The petitioner filed the instant Form I-360 on July 28, 2006. The director issued a Notice of Intent to Deny (NOID) on November 20, 2006 and denied the petition on March 28, 2007, finding that the petitioner failed to

¹ Name withheld to protect individual's identity.

² United States District Court, Northern District of Iowa, Case No.: [REDACTED]

³ Due to this conviction, the additional charge of deportability for conviction of a crime involving moral turpitude under section 237(a)(2)(A)(i) of the Act was added to the petitioner's NTA on December 17, 2004.

⁴ Elkhart Indiana Circuit Court, Docket No.: [REDACTED]

⁵ Elkhart Superior Court 6, Indiana, Civil Notice [REDACTED]

establish that he is a person of good moral character. Specifically, the director found that the petitioner's conviction under 18 U.S.C. § 1001(a)(2) is a crime involving moral turpitude for which there was not an applicable exception. The petitioner, through counsel, timely appealed.

On appeal, counsel does not argue that the petitioner's conviction is not a crime involving moral turpitude, but rather that the director "did not articulate the foundation or basis of his finding that the October 1, 2003 conviction constituted a conviction for a crime involving moral turpitude." While we agree that the director failed to provide any specific reasoning or discussion for his determination that the petitioner had been convicted of a crime involving moral turpitude, we concur with the ultimate determination that the petitioner's conviction under 18 U.S.C. § 1001(a)(2) is a crime involving moral turpitude for which there is no exception.

At the time of the petitioner's conviction, 18 U.S.C. § 1001(a)(2) stated:

Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

* * *

(2) makes any materially false, fictitious, or fraudulent statement or representation

* * *

shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1001(a)(2) (2003)

The petitioner's indictment, to which he pled guilty, provides the following pertinent information:

On or about August 15, 2001, in the Northern District of Iowa, in a matter within the jurisdiction of the Social Security Administration, an agency and department of the United States, the [petitioner], did knowingly and willfully make, and cause to be made, materially false, fictitious, and fraudulent statements and representations, in that the defendant informed the Social Security Administration in an Application for a Social Security Card, that he used an Immigration and Naturalization Service I-94 number claiming that it was his when it was not.

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).

Offenses involving fraud have been found to fall squarely within the jurisprudential definition of crimes involving moral turpitude. As the Supreme Court stated in *De George*,

Whatever else the phrase “crime involving moral turpitude” may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . The phrase “crime involving moral turpitude” has without exception been construed to embrace fraudulent conduct.

De George, 341 U.S. at 232. The federal courts of appeals including the Seventh Circuit, in which this case arose, and the BIA repeatedly cite *De George* as authority for the principle that crimes of which fraud is an element necessarily involve moral turpitude. See e.g. *Padilla v. Gonzales*, 397 F.3d 1016, 1020 (7th Cir. 2005) (“[I]t is settled that ‘crimes in which fraud [is] an ingredient’ involve moral turpitude,” quoting *De George*.), *Flores*, 17 I&N Dec. at 228 (quoting the above cited passage of *De George* as the Supreme Court’s definition of moral turpitude). See also *Correa-Garces*, 20 I&N Dec. 451, 454 (BIA 1992) (“Crimes involving fraud are considered to be crimes involving moral turpitude.”). Indeed, even when fraud is not an explicit statutory element of an offense, a crime will still be found to involve moral turpitude if fraud is inherent to the proscribed offense. *Matter of Flores*, 17 I&N Dec. at 228, *Matter of Bart*, 20 I&N Dec. 436, 437-438. The BIA has also found that fraud related to social security numbers is a crime involving moral turpitude. See *Matter of Adetiba*, 20 I&N Dec. 506, 507-08 (conviction under 42 U.S.C. § 408 for falsely representing a social security number is a crime involving moral turpitude).

The petitioner’s conviction of a crime in which fraud is an explicit element of the offense precludes a finding of his good moral character pursuant to section 101(f)(3) of the Act as he is an alien described in section 212(a)(2)(A)(i)(I) of the Act, as an alien convicted of “a crime involving moral turpitude.”

The Relevant Statutory Exceptions and Discretionary Provision Do Not Apply to the Petitioner’s Case

Section 212(a)(2)(A)(ii) of the Act provides two exceptions to determining that an alien has committed or been convicted of a crime involving moral turpitude. However, neither of these exceptions apply to the petitioner. The first exception is for crimes committed by juveniles under the age of 18 and five years prior to their application for immigration benefits. Section 212(a)(2)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(I). The petitioner was 21 years old at the time he committed his offense. As such, this exception is inapplicable.

The second exception applies when the *maximum possible penalty* for the crime of which the alien was convicted does not exceed imprisonment for one year and the alien was not sentenced to a term of imprisonment in excess of six months. Section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Although the petitioner was not sentenced to five years of imprisonment, the statutory provision under which he was convicted prescribed a maximum possible penalty of up to five years of imprisonment. See 18 U.S.C. § 1001(a)(2) (2003). Accordingly, the second exception to section 212(a)(2)(A)(ii) of the Act does not encompass the petitioner.

We are also unable to find the petitioner to be a person of good moral character pursuant to section 204(a)(1)(C) of the Act. That provision grants Citizenship and Immigration Services (CIS) the discretion to find a petitioner to be a person of good moral character despite the petitioner’s criminal offense 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 for self-petitioners under section 212(h)(1)(C) of the Act, the petitioner's conviction was not connected to his battery or subjection to extreme cruelty by his U.S. citizen spouse. The petitioner was convicted of an offense committed on or about August 15, 2001. In his affidavit, the petitioner states that he met his U.S. citizen spouse in March 2002. The submitted certificate attests to the couple's marriage in August 2002. Hence, the record clearly shows that the petitioner's conviction was unrelated and in no way connected to any battery or extreme cruelty later inflicted upon him by his spouse. Section 204(a)(1)(C) of the Act thus does not apply to the petitioner.

Counsel claims that the director erred in failing to consider the provisions contained in section 212(a)(2)(F) of the Act and the petitioner's application for a waiver of inadmissibility under section 212(h) of the Act. We are not persuaded by either of counsel's claims. First, as it relates to the petitioner's application for a waiver of inadmissibility, neither we nor the director have jurisdiction to adjudicate the petitioner's waiver application in these proceedings. 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 inadmissibility determination. There is also no application for adjustment of status before us.⁶ We note that the petitioner may request a waiver of inadmissibility under section 212(h)(1) of the Act before an immigration judge as he is currently in removal proceedings.

Counsel's final argument, that the petitioner "is not statutorily precluded from a showing of 'good moral character' [because] he was not confined to a penal institution 'for an aggregate period of one hundred and eighty days or more,'" is equally unpersuasive. While we do not dispute that the petitioner was not imprisoned for more than 180 days, the section of the Act referred to by counsel, section 101(f)(7), is not relevant to the above discussion regarding the petitioner's conviction for a crime involving moral turpitude under section 101(f)(3) of the Act.

The record shows that the petitioner has been convicted of a crime involving moral turpitude and cannot be found to be a person of good moral character pursuant to section 101(f) of the Act. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁶ 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).