U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 21

EAC 05 158 50395

IN RE: Petitioner: [redacted]

PETITION: Petition for Special 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 Acting Director (Director), Vermont Service Center, denied the immigrant visa petition. The director granted a subsequent motion to reopen and affirmed her prior decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner seeks immigrant classification as a special 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 record did not establish the petitioner's 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 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 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 person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or 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. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

The evidentiary standard and 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. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she 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.

Procedural History and Pertinent Facts

The record in this case documents the following pertinent facts and procedural history. The petitioner is a native and citizen of Mexico. On April 28, 2001, the petitioner married G-S-*, a U.S. citizen, in Walla Walla, Washington. The petitioner's spouse filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf on June 4, 2001. The Form I-130 was denied for abandonment on June 12, 2002. The petitioner filed this Form I-360 on May 5, 2005. The director issued a Request for Evidence (RFE) on August 5, 2005 and on September 6, 2005 the petitioner timely responded to the RFE. The director denied the petition on December 21, 2005 and reaffirmed the decision on March 3, 2006 in a subsequent motion to reopen. The petitioner, through counsel, timely appealed.

On appeal, counsel claims that because the petitioner's arrest took place over three years prior to the filing of the petition, she is not precluded from establishing her good moral character. Upon review, we find that we concur with the director's determination that the record does not demonstrate the petitioner's good moral character. Counsel's claims on appeal do not overcome this ground for denial. Despite the petitioner's ineligibility, the case will be remanded because the director denied the petition without first issuing a Notice of Intent to Deny (NOID) pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii).

The record contains evidence that on November 18, 2002 in the Superior Court of Washington, County of Walla Walla, the petitioner pled guilty to and was convicted of the crime of "Complicity To Theft In The Second Degree," under the Revised Code of Washington (RCW) sections 9A.56.040 and 9A.08.020. The sections state, in pertinent part:

Theft in the second degree – Other than firearm.

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) two hundred and fifty dollars in value other than a firearm . . . but does not exceed one thousand five hundred dollars in value; or

(b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant; or

(c) An access device; or

(d) A motor vehicle, of a value less than one thousand five hundred dollars.

(2) Theft in the second degree is a class C felony.

RCW § 9A.56.040.

Liability for conduct of another – Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of a crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, or encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

RCW § 9A.08.020.

The court sentenced the petitioner to 20 days of jail, 160 hours of community service, and 12 months of supervised custody.

On appeal, counsel claims that because the petitioner's offense occurred outside the three-year period prior to filing, the Service is precluded from using this offense to find that the petitioner lacks good moral character. We do not find counsel's argument to be persuasive. First, the case cited by counsel, *United States v. Hovsepian*, 422 F.3d 883, involved an applicant for naturalization. Unlike the statute and regulations that pertain to eligibility for naturalization which specifically proscribe a time period in which good moral character must be met, there is no similar provision in the instant statute or regulation.[1] The statute cited by counsel, section 101(f)(3) of the Act, 8 U.S.C. § 1101, while it does address good moral character, it does not state a time period during which the self-petitioner must demonstrate his or her good moral character. Similarly, the statute related to battered spouses, section 204(a)(1)(A)(iii)(II)(cc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(cc), contains no such limitation. Counsel's argument regarding a "time limitation" on good moral character appears to be based upon the regulation at 8 C.F.R. § 204.2(c)(2)(v) which states that primary evidence of a self-petitioner's good moral character includes local police clearances or state-issued criminal background checks from each place where the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. The regulation's designation of the three-year period preceding the filing of the petition, however, does not limit the temporal scope of the Service's inquiry into the petitioner's good moral character. Contrary to counsel's assertion, 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). In this case, the record contains evidence of the petitioner's 2002 conviction, thus providing ample reason to believe that the self-petitioner lacked good moral character.

The Petitioner was Convicted of a Crime Involving Moral Turpitude

Pursuant to the regulations, binding administrative decisions and relevant federal case law, the petitioner's 2002 conviction was for a crime involving moral turpitude. The regulation at 8 C.F.R. § 204.2(c)(1)(vii) directs that 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. 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 1182(a)(2) of this title [section 212(a)(2) of the Act] . . . if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period . . . ;
>
> * * *
>
> (8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43))[.]

[1] *See* Section 316(a) of the Act, 8 U.S.C. § 1427 and 8 C.F.R. §§ 316.2(a)(7) and 316.10(a).

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 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 further held 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). The Ninth Circuit has deferred to the BIA's long held determination that larceny and theft offenses are crimes of moral turpitude. *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999); *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.").

In this case, the record is sufficient to establish that the petitioner's 2002 conviction for Complicity to Theft in the Second Degree in Washington was for a crime of moral turpitude. Counsel does not contest the determination that the crime of theft in the second degree under § 9A.56.040 of the RCW is 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, but 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 turned 18 years old on May 15, 2001 and the offense in question was committed on March 13, 2002. Accordingly, this exception is inapplicable to the petitioner. 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). Section 9A.56.040 of the RCW, the class C felony under which the petitioner was convicted, mandates a maximum penalty of five years. *See* § 9A.20.021 of the RCW. Although the petitioner was only sentenced to serve 20 days, the statutory provision under which she was convicted prescribed a maximum possible penalty of five years. Accordingly, the second exception to section 212(a)(2)(A)(ii) does not encompass the petitioner.

We are also unable to find the petitioner to be a person of good moral character pursuant to the discretionary provision enacted by Title V of the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, Pub. L. 06-386. Section 204(a)(1)(C) of the Act, as amended by the VTVPA, provides 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 for self-petitioners under section 212(h)(1)(C) of the Act, the petitioner's conviction was not connected to her battery or subjection to extreme cruelty by her U.S. citizen husband. The petitioner has failed to submit any evidence to establish that her conviction was connected in any way to battery or extreme cruelty later inflicted upon her by her spouse. We are thus barred from finding 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.

Although we have reviewed the evidence regarding the petitioner's dedication as a mother and "as an asset to her community," we are statutorily barred from exercising discretion to find her to be a person of good moral character because she has been convicted of a crime involving moral turpitude and is not a person of good moral character pursuant to section 101(f) of the Act. No amount of evidence provided by the petitioner related to her rehabilitation and reform of character can overcome the statutory bar. Based on the present record, the petitioner is ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

However, the case will be remanded because the director failed to issue a NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which states, in pertinent part:

> *Notice of intent to deny.* If the preliminary decision on a properly filed self-petition is adverse to the self-petitioner, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

Accordingly, the case must be remanded for issuance of a NOID pursuant to the regulation at 8 C.F.R. § 204.2(c)(3)(ii), which will give the petitioner a final opportunity to establish her good moral character.

As always, the burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with this decision.