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U.S. Citizenship  
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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: MAY 23 2006  
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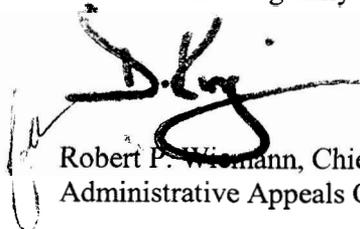
IN RE: Petitioner: [Redacted]

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

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. Wisnann, 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 The decision of the director will be withdrawn and the petition will be remanded for further action.

The petitioner is a native and citizen of Mexico who states that he entered the United States without inspection on March 15, 1995. On May 23, 2003, the petitioner married [REDACTED] a lawful permanent resident of the United States, in Miami, Florida. On September 10, 2004, the petitioner filed this petition seeking immigrant classification pursuant to section 204(a)(1)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien subjected to battery or extreme cruelty by his U.S. lawful permanent resident spouse.

On August 5, 2005, the director denied the petition because the record failed to establish that the petitioner was a person of good moral character.

On appeal, the petitioner submits additional evidence. We concur with the director's determination that the petitioner is not a person of good moral character and find that the evidence submitted on appeal does not overcome this basis for denial. Nonetheless, 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).

Section 204(a)(1)(B)(ii) of the Act provides, in pertinent part, that an alien who is the spouse of a lawful permanent resident of the United States may self-petition for preference immigrant classification if the alien demonstrates that he or she entered into the marriage with the lawful permanent resident spouse in good faith and that during the marriage, the alien was battered by or was the subject of extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as a preference immigrant under section 203(a)(2)(A) of the Act, resided with the spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II), 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

The regulation at 8 C.F.R. § 204.2(c)(1)(vii) 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 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 . . . .

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 statute does not state a time period during which the self-petitioner must demonstrate his or her good moral character. See Section 204(a)(1)(B)(ii)(II)(cc) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(bb). The regulation at 8 C.F.R. § 204.2(c)(2)(v) states, in pertinent part:

*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’s designation of the three-year period preceding the filing of the petition does not limit the temporal scope of the inquiry into the petitioner’s good 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). See also Memo. from William R. Yates, Citizenship and Immigration Services (CIS) Associate Dir. Operations, *Determinations of Good Moral Character in VAWA-Based Self-Petitions*, 2, (Jan. 19, 2005).

On March 30, 2005, the director issued a notice requesting the final disposition of the petitioner’s felony arrest record and evidence of his good faith marriage to [REDACTED]. On May 31, 2005, the petitioner submitted evidence related to his good faith marriage, but did not submit the requested documentation regarding his arrest. On appeal, the petitioner submits copies of his arrest and jail booking records, notice of termination of supervision by the Florida Department of Corrections, and support letters from his pastor and two friends.

### *The Petitioner's Crime*

The petitioner was arrested on October 20, 1999 and charged with cruelty to animals in violation of section 828.12(2) of the Florida Statutes, which states:

A person who intentionally commits an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering, or causes the same to be done, is guilty of a felony of the third degree, punishable as provided in s. 775.082 or by a fine of not more than \$10,000, or both.

Section 775.082(3)(d) of the Florida Statutes prescribes a term of imprisonment not exceeding five years for felonies of the third degree. The petitioner's arrest record states that a witness saw the petitioner put a chain around a dog's neck, get into his car, speed off and drag the dog. When the petitioner saw the witness, the witness stated that he yelled, "You got my tag? So what, it's my dog." and sped off again. The police officer observed a long trail of blood leading to the petitioner's vehicle parked at his residence and an injured dog tied to a tree in the backyard. The arrest record further states that a veterinarian examined the dog, found internal injuries and bleeding and that the dog would be euthanized. CIS records do not include copies of the full court record for the petitioner's criminal case. However, CIS records show that on February 14, 2000, the petitioner was found guilty of violating section 828.12(2) of the Florida Statutes, but adjudication was withheld and the petitioner was placed on two years of probation.

Although the Florida court withheld adjudication of the petitioner's criminal case, the petitioner is still considered to have been convicted of a crime under immigration law. Section 101(a)(48)(A) of the Act states:

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). *See Matter of Roldan*, 22 I&N Dec. 512, 518 (BIA 1999) (quoting legislative history in support of the determination that the respondent, who pled guilty, was punished, but whose adjudication was withheld, was nonetheless convicted under section 101(a)(48)(A) of the Act); *Chong v. INS*, 890 F.2d 284 (11<sup>th</sup> Cir. 1989) (alien considered convicted under immigration law even though Florida state court withheld adjudication of the alien's guilt). The Eleventh Circuit Court of Appeals, wherein this petition arose, has held that when an alien

has been found guilty and punished, he or she falls within the Act's definition of conviction regardless of whether adjudication is withheld or the conviction is later expunged pursuant to a state rehabilitative statute. *United States v. Anderson*, 328 F.3d 1326, 1328 (11<sup>th</sup> Cir. 2003) (holding that, in connection with section 2L1.2(b)(1)(B) of the U.S. Sentencing Guidelines, the Act's definition of a conviction "includes a *nolo contendere* plea with adjudication withheld as long as some punishment, penalty, or restraint on liberty is imposed."). See also *Resendiz-Alcaraz v. Ashcroft*, 383 F.3d 1262, 1271 (11<sup>th</sup> Cir. 2004) ("a state conviction is a conviction for immigration purposes, regardless of whether it is later expunged under a state rehabilitative statute, so long as it satisfies the requirements of [8 U.S.C.] § 1101(a)(48)(A).") But see *Alim v. Gonzales*, \_\_ F.3d \_\_, 2006 WL 1059322 (11<sup>th</sup> Cir. Apr. 24, 2006) (distinguishing cases where an alien's conviction is vacated due to a legal defect in the underlying criminal proceeding). Counsel presents no reasons why the petitioner should not be considered convicted under section 101(a)(48)(A) of the Act and binding caselaw.

*The Petitioner Lacks Good Moral Character Because He was Convicted of a Crime Involving 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 (8<sup>th</sup> Cir. 1995). 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.* The BIA has stated 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 statute under which the petitioner was convicted prescribes a *mens rea* of intentional commission of an act to an animal, which causes or results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering. This criminal intent meets the test for moral turpitude described in *Matter of Flores*. Although we have found no caselaw which specifically addresses the issue of whether or not cruelty to animals (rather than humans) is a crime involving moral turpitude, counsel has presented no reasons why the criminal intent of section 828.12(2) of the Florida Statutes should not be found to classify the petitioner's crime as one involving moral turpitude under relevant BIA precedent decisions or federal caselaw interpreting that term. Consequently, the present record shows that the petitioner is not a person of good moral character due to his conviction 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, 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 was 21 years old at the time he committed his crime and so this exception does not apply to him. 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). The petitioner was convicted of animal cruelty under section 828.12(2) of the Florida Statutes, a third degree felony, for which section 775.082(3)(d) of the Florida Statutes prescribes a maximum penalty of five years imprisonment. Accordingly, the second exception to section 212(a)(2)(A)(ii) does not apply to 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 [REDACTED] alleged battery or extreme cruelty. The petitioner committed his crime in 1999, three years before he met [REDACTED], according to his October 7, 2004 statement. Hence, the record clearly shows that the petitioner's conviction was unrelated to [REDACTED] purported abuse. 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.

On appeal, the petitioner submits three support letters as evidence of his good moral character. These letters indicate that the petitioner attends church, is regarded as an excellent and trustworthy worker by his employer, and that his former girlfriend believes he was wrongly accused of his crime. Whatever probative value these letters may have, section 204(a)(1)(B)(ii)(II)(bb) of the Act and the regulation at 8 C.F.R. § 204.2(c)(1)(vii) bar us from finding the petitioner to be a person of good moral character because he was convicted of a crime involving moral turpitude. The petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(B)(ii) of the Act.

However, the case will be remanded because the director failed to issue a NOID before denying the petition. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) 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 will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of his case.

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 the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.