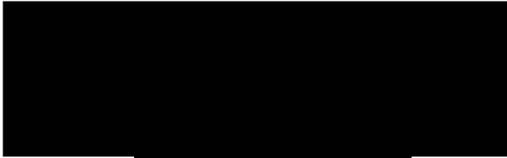


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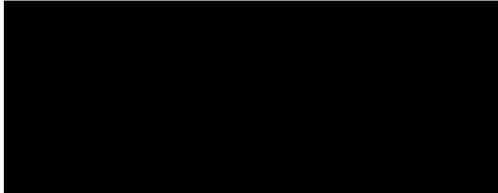
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Date: **OCT 12 2006**

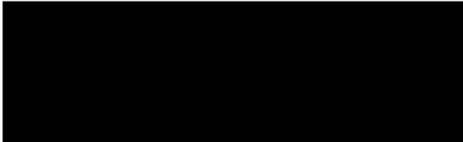
IN RE:

Petitioner:



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:



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 The decision of the director will be withdrawn and the petition will be remanded for further action.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

An alien who has divorced a United States citizen may still self-petition for immigrant classification under section 204(a)(1)(A)(iii) of the Act if the alien demonstrates that he or she is a person:

who was a bona fide spouse of a United States citizen within the past 2 years and –

* * *

(ccc) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse.

Section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC).

Section 204(a)(1)(J) of the Act further 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].

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 of Syria and citizen of Spain. In a letter dated September 3, 2002 and submitted in connection with her second Form I-485, application to adjust status, the petitioner states that she has been married three times. In his letter dated August 12, 2002, [REDACTED] of the Islamic Center of Virginia, states that the petitioner's first marriage to M-E-* was "officially terminated on July 22, 1994 through a normal Islamic divorce process." On March 27, 1997, the petitioner married B-H-*, a U.S. citizen, in Henrico County, Virginia. In 1998, the legacy Immigration and Naturalization Service (INS) denied B-H-'s Form I-130, petition for alien relative, filed on the petitioner's behalf and also denied the petitioner's corresponding Form I-485 pursuant to section 204(c) of the Act because the record established that their marriage was entered into solely for the purpose of obtaining lawful permanent residency status for the petitioner. The petitioner and B-H- were divorced on October 21, 1998, by order of the Circuit Court of Henrico County, Virginia.

The petitioner married her third spouse, D-D-*, a U.S. citizen, on March 12, 2001 in Redwood City, California. The petitioner was paroled into the United States on October 16, 2003 based on her then-pending application for adjustment of status filed pursuant to a Form I-130 filed by D-D- on her behalf. On December 23, 2003, the Superior Court of California, Contra Costa County annulled the petitioner's marriage to D-D-. Citizenship and Immigration Services (CIS) denied the petitioner's corresponding Form I-485 on May 6, 2004 because D-D- had withdrawn his Form I-130 and submitted evidence of the annulment. The petitioner filed this Form I-360 on August 12, 2004. The director issued a Request for Evidence (RFE) on August 23, 2004 and on March 16, 2005 and the petitioner timely responded to both RFEs with additional evidence. The director denied the petition on January 13, 2006 finding that the petitioner was not a person of good moral character due to her criminal convictions. The petitioner, through counsel, timely appealed.

On appeal, counsel claims that the petitioner's criminal convictions should not render her ineligible because her 2001 conviction was connected to her former husband's extreme cruelty and because her 1994 petit larceny convictions occurred outside of the three-year period preceding the filing of this petition and because the petit larceny convictions either fall within the petty offense exception or the petitioner is eligible for a waiver of inadmissibility under section 212(h) of the Act. We agree with the director's determination that the record does not demonstrate the petitioner's good moral character due to her convictions. Counsel's claims on appeal do not overcome this ground for denial.

* Name withheld to protect individual's identity.

Beyond the director's decision, the present record also fails to establish that the petitioner had a qualifying relationship with D-D- and was eligible for immediate relative status based on their relationship due to the lack of documentation regarding the legal termination of the petitioner's first marriage. Beyond the director's decision, approval of this petition is also barred pursuant to section 204(c) of the Act due to the agency's prior determination that the petitioner entered into marriage with her second husband solely for the purpose of evading the immigration laws.

Despite the petitioner's ineligibility on these four grounds, 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).

1. Qualifying Relationship and Eligibility for Immediate Relative Classification

Beyond the director's decision, the present record does not demonstrate that the petitioner had a qualifying relationship with D-D- pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act. The relevant evidence does not establish that the petitioner's first marriage was ever legally terminated prior to her marriage to D-D-, thus rendering their marriage invalid.

Primary evidence of a qualifying relationship with a U.S. citizen spouse is a marriage certificate issued by civil authorities, and proof of the legal termination of all the self-petitioner's prior marriages. 8 C.F.R. § 204.2(c)(2)(ii). The record shows that the petitioner was married twice before her marriage to D-D-. In connection with her second Form I-485 (based on the Form I-130 petition filed by D-D- on the petitioner's behalf), the petitioner submitted a certified copy of her divorce decree from her second husband, B-H-, but submitted no evidence of her divorce from her first husband, apart from Dr. [REDACTED] letter.

In a letter dated July 22, 2003, the petitioner's former counsel stated:

My client was married in Egypt to [M-E-] in an Islamic ceremony. The couple was divorced in Virginia according to the Islamic law. . . . My client never sought to terminate the marriage in the American court since the parties believed that the Islamic divorce was sufficient, and that they were foreigners [sic]. I believe this Islamic divorce is recognized in Egypt or any Islamic countries since it was done according to the Islamic divorce process, as attested by the Virginian Imam (religious leader), where the couple obtained their Islamic divorce.

The record is devoid of any evidence to support former counsel's belief regarding the validity of the petitioner's Islamic divorce in Egypt. [REDACTED] simply states that the petitioner's Islamic marriage to her first husband, M-E-¹, "was officially terminated on July 22, 1994 through a normal Islamic divorce process." [REDACTED] does not specify where the Islamic divorce took place and does not

refers to the petitioner's first husband as M-A-, but his reference appears to be an alternative spelling of M-E-'s name.

state that he personally conducted or oversaw the petitioner's divorce. [REDACTED] also does not explain the specific steps or procedures involved in "a normal Islamic divorce process" and he does not verify that all the requisite steps or procedures were followed in the petitioner's divorce. *See Iyamba v. INS*, 244 F.3d 606 (8th Cir. 2001) (court rejected validity of extra-judicial divorce where the documentary evidence failed to demonstrate that all ceremonial procedures were followed and the testimonial evidence was conclusory). In a letter addressed to the petitioner and dated July 3, 2003, the San Francisco District Director requested the petitioner to submit the original marriage and divorce decree relating to her and M-E-. The District Director explained, "The attestation from the Islamic Center of Virginia, dated August 12, 2002, is not sufficient to prove that your marriage to [M-E-] was properly terminated." The petitioner did not submit the requested documents.

The present record does not establish the validity of the petitioner's alleged divorce from her first husband. A divorce is generally recognized under U.S. immigration law when the divorce is shown to be valid under the laws of the jurisdiction granting the divorce. *Matter of Luna*, 18 I&N Dec. 385, 386 (BIA 1983). In this case, petitioner's former counsel intimated that the petitioner's religious divorce would be recognized as valid in Egypt even though the divorce was not conducted there. The record contains no evidence to support this claim. The record also fails to sufficiently document the alleged divorce. Although [REDACTED] states that the petitioner was divorced on July 22, 1994, his letter is dated over eight years after the purported divorce. [REDACTED] also does not state that he personally conducted the divorce and the record is devoid of any contemporaneous documentation of the divorce.

The petitioner submitted insufficient evidence of her alleged 1994 divorce from her first husband. Even if the divorce itself were sufficiently documented, the record contains no evidence that the petitioner's divorce was valid under Egyptian law and would be considered valid for immigration purposes. Accordingly, the record does not establish that the petitioner's marriage to M-E- was legally terminated prior to her marriage to D-D- and that their marriage was valid given her apparent bigamy. The petitioner has thus not demonstrated a qualifying relationship with D-D- pursuant to section 204(a)(1)(A)(iii)(II)(aa)(CC) of the Act. While the annulment of the petitioner's marriage to D-D- may have been connected to his abuse, the record does not establish that the petitioner was D-D-'s bona fide spouse at any time.

Beyond the director's decision, the present record also fails to establish that the petitioner was eligible for immediate relative classification based on her relationship with D-D-, as required by section 204(a)(1)(A)(iii)(II)(cc) of the Act. The regulation at 8 C.F.R. § 204.2(c)(1)(B) requires that a self-petitioner be eligible for immediate relative classification under section 201(b)(2)(A)(i) of the Act based on his or her relationship to the abusive spouse. Because the petitioner did not establish the validity of her marriage to D-D-, she was also ineligible for immediate relative classification based on their former marriage.

2. Approval Barred under Section 204(c) of the Act

Beyond the director's decision, the petition may not be approved pursuant to section 204(c) of the Act, which states, in pertinent part:

[N]o petition shall be approved if –

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative . . . status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the [Secretary of Homeland Security] to have been entered into for the purpose of evading the immigration laws, or
- (2) the [Secretary of Homeland Security] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The corresponding regulation at 8 C.F.R. § 204.2(a)(ii), states:

Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

A decision that section 204(c) of the Act applies must be made in the course of adjudicating a subsequent visa petition. *Matter of Rahmati*, 16 I&N Dec. 538, 539 (BIA 1978). CIS may rely on any relevant evidence in the record, including evidence from prior CIS proceedings involving the beneficiary. *Id.* However, the adjudicator must come to his or her own, independent conclusion and should not ordinarily give conclusive effect to determinations made in prior collateral proceedings. *Id.*; *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

After a full, independent review of the relevant evidence in the record, we conclude that the petitioner's former marriage to B-H- was entered into for the purpose of evading the immigration laws and we are consequently barred from approving her petition pursuant to section 204(c) of the Act. The certificate of marriage between the petitioner and B-H- states that it was the petitioner's first marriage and the Form I-130 petition filed by B-H- also states that the petitioner had not been married before. However, on June 2, 1998, INS issued a NOID for the Form I-130 filed by B-H-. The NOID stated that INS records showed that the petitioner entered the United States on October 19, 1993 as the J-2 spouse of a J-1 exchange visitor and that with her Form I-539, application to extend nonimmigrant status that was approved on May 2, 1995, the petitioner twice referred to her

husband, M-E-. The NOID further informed B-H- that an INS investigation had established that the petitioner and B-H- had not lived together in the past and were presently living in different states. B-H- did not respond to the NOID and his Form I-130 petition was consequently denied under section 204(c) of the Act. On October 2, 1998, the Virginia District Director denied the petitioner's Form I-485, application to adjust status based on B-H-'s Form I-130 petition. The agency decision informed the petitioner that B-H-'s Form I-130 petition had been denied pursuant to section 204(c) of the Act.

The record supports the District Director's determination. The record shows that the petitioner and B-H- failed to appear for their first scheduled interview and did not appear for two subsequently rescheduled interviews. The record indicates that the petitioner visited the District Office on at least two occasions, stated that she had not received an interview notice and informed the office of new addresses for her and B-H-. Yet numerous notices from the agency were returned by the postal service because the addressee had moved or the mail was unclaimed. The record is devoid of any documentary evidence of the bona fides of the former couple's marriage. Evidence that a marriage was not entered into for the primary purpose of evading the immigration laws may include, but is not limited to, proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences together. *Matter of Phillis*, 15 I&N Dec. 385, 386-87 (BIA 1975). The petitioner and B-H- submitted no such evidence, even though the petitioner went to the district office in person on at least two occasions to inquire about her adjustment case. In addition, the record fails to establish that the validity of the petitioner's marriage to B-H- given the lack of documentary evidence of the legal termination of her prior marriage to M-E-. The record thus supports the District Director's conclusion that the petitioner and B-H- willfully misrepresented the petitioner's prior marital status. An independent review of the record supports the District Director's determination that the petitioner married B-H- for the purpose of evading the immigration laws. Consequently, section 204(c) of the Act bars the approval of the instant petition.

3. Good Moral Character

The record contains the following evidence of four criminal offenses committed by the petitioner:

- 1) On August 18, 1994, the petitioner pled guilty to and was convicted of petit larceny in violation of section 18.2-96 of the Code of Virginia, a class one misdemeanor, by the Henrico County Virginia General District Court. The court sentenced the petitioner to a \$50 fine and 12 months of jail, with 12 months suspended. The charging document states that on July 27, 1994, the petitioner stole clothing valued at \$194.98 from the Leggetts department store in Virginia Center Commons.
- 2) On August 18, 1994, the petitioner pled guilty to and was convicted of petit larceny in violation of section 18.2-96 of the Code of Virginia, a class one misdemeanor, by the Henrico County Virginia General District Court. The court sentenced the petitioner to a \$50 fine and 12 months of jail, with 12 months suspended. The charging document states that on July 27, 1994, the

petitioner stole kitchen magnets worth less than \$200.00 from the Lechters store in Virginia Center Commons.

- 3) On October 14, 1994, the petitioner pled guilty to disorderly conduct, a violation of section 240.20 of the New York Penal Law and was sentenced to one-year of conditional discharge. The conviction record states that the petitioner was arrested on October 13, 1994 and charged with petit larceny and criminal possession of stolen property in the fifth degree, but the conviction record does not contain the charging document or the amended charge of disorderly conduct.
- 4) On September 6, 2001, the petitioner was found guilty of failure to appear before the Henrico County Virginia General District Court pursuant to a charge of petit larceny, third offense committed on September 9, 1997. The original charge of a felony offense was amended and the petitioner was convicted of a misdemeanor offense under section 19.2-128 of the Code of Virginia. The court sentenced the petitioner to 12 months of jail, with 10 months suspended.

A. The Statute Does Not Prescribe a Time Period During Which Good Moral Character Must be Shown.

On appeal, counsel claims that CIS “is barred from considering acts outside the 3-year period prior to the date of application.” Counsel is incorrect. 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)(A)(iii)(II)(cc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(cc). The regulation at 8 C.F.R. § 204.2(c)(2)(v) 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. Yet the regulation’s designation of the three-year period preceding the filing of the petition does not limit the temporal scope of CIS’ 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). In this case, the record contained evidence of the petitioner’s 1994 and 2001 convictions, thus providing ample reason to believe that the self-petitioner lacked good moral character.

B. The Petitioner was Convicted of Two Crimes Involving Moral Turpitude

Pursuant to the regulations, binding administrative decisions and relevant federal case law, the petitioner’s 1994 petit larceny convictions were for crimes 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 –

* * *

(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)) [.]

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).

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.* Where the statute includes offenses that both do and do not involve moral turpitude, we must look to the record of conviction to determine whether the crime committed involved moral turpitude. *Id.* The record of conviction includes the indictment or charging documents, plea, verdict and sentence. *Id.* at 137-38.

In this case, the record is insufficient to determine whether the petitioner’s 1994 conviction for disorderly conduct in New York was a crime involving moral turpitude. The New York disorderly conduct statute encompasses offenses which may or may not involve moral turpitude. Without the charging document and full conviction record, we cannot determine whether the petitioner’s disorderly conduct offense involved moral turpitude.

However, the record is sufficient to establish that the petitioner's two 1994 convictions for petit larceny in Virginia were for crimes of moral turpitude. The petitioner was twice convicted of petit larceny in violation of section 18.2-96 of the Code of Virginia, which states, in pertinent part:

Any person who:

* * *

2. Commits simple larceny not from the person of another of goods and chattels of the value of less than \$200 . . . shall be deemed guilty of petit larceny, which shall be punishable as a Class 1 misdemeanor.

Va. Code Ann. § 18.2-96 (West 2006).

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."). Although the Virginia statute does not explicitly state the *mens rea* of petit larceny, larceny has been defined by Virginia courts as the wrongful taking of personal goods of some intrinsic value without the owner's consent and with the intention to deprive the owner thereof permanently. *Foster v. Com.*, 606 S.E. 2d 518, 577 (Va. App. 2004), *aff'd* 623 S.E. 2d 902 (Va. 2006). As the petitioner's two 1994 convictions for petit larceny in Virginia thus required proof of such malevolent intent, her offenses constitute crimes involving moral turpitude and prevent a finding of her good moral character pursuant to section 101(f)(3) of the Act.

On appeal, counsel contends that the petitioner's petit larceny convictions fall within the so-called "petty offense exception" for a single crime of moral turpitude at section 212(a)(2)(A)(ii)(II) of the Act because the two convictions arose from a single scheme of misconduct. Counsel's analysis is misguided. Counsel cites section 212(a)(2)(B) of the Act in support of his claim that the petitioner's two offenses should be regarded as one crime. Yet section 212(a)(2)(B) is irrelevant to the petitioner's convictions because this subsection renders an alien inadmissible "*regardless of whether . . . the offenses arose from a single scheme of misconduct*" (emphasis added) and the subsection applies to multiple criminal convictions for which the aggregate sentences to confinement were five years or more. The petitioner was convicted of two distinct offenses with aggregate jail sentences of 24 months. Although her 1994 petit larceny crimes were committed on the same day and within the same shopping center, the petitioner's crimes took place in two different stores where she stole different goods and are two distinct offenses. See *Akindemowo v. INS*, 61 F.3d 282 (4th Cir. 1995) (Grand larceny of passing two fraudulent checks at two different stores at the same mall on the same day considered separate crimes).

Counsel claims, in the alternative, that the petitioner's petit larceny convictions are waivable under section 212(h) of the Act because the petitioner suffered extreme hardship and her "petty offenses"

occurred over twelve years ago. Again, counsel misreads the statute. Section 212(h) of the Act allows the discretionary waiver of the inadmissibility bar due to a conviction for a crime of moral turpitude if an immigrant establishes that his or her denial of admission would cause extreme hardship to his or her U.S. citizen or lawfully resident spouse, parent, son or daughter. Section 212(h)(1)(B) of the Act, 8 U.S.C. § 1182(h)(1)(B). Extreme hardship to the immigrant him or herself is no longer a basis for the waiver. Regardless of the irrelevancy of the alleged extreme hardship to the petitioner herself, section 212(h)(1)(B) of the Act is inapplicable to the petitioner because she is not an immigrant.

Counsel overlooks the relevant subsection of section 212(h)(1) of the Act, which states that the inadmissibility bar due to a conviction for a crime of moral turpitude may be waived if:

(C) the alien qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) . . .
and

(2) the [Secretary of Homeland Security], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Section 204(a)(1)(C) of the Act allows CIS to find, as a matter of discretion, that a self-petitioner is a person of good moral character despite his or her conviction of a crime of moral turpitude if the crime is waivable for purposes of determining admissibility under section 212(a) of the Act and the crime was connected to the self-petitioner's having been battered or subjected to extreme cruelty. Although a conviction for a crime of moral turpitude is waivable under section 212(h)(1)(C) of the Act (as cited above), no connection exists between the petitioner's 1994 petit larceny convictions and D-D-'s battery or extreme cruelty because the petitioner's convictions occurred over three years before she states that she met D-D- and over six years before their marriage.

C. The Petitioner's 1994 Petit Larceny Convictions are Aggravated Felonies

The director determined that the petitioner's 1994 convictions also barred a finding of her good moral character pursuant to section 101(f)(8) of the Act because her 1994 convictions constitute aggravated felonies under section 101(a)(43)(G) of the Act, which defines an aggravated felony as, *inter alia*, a theft offense for which the term of imprisonment is at least one year. For both of her 1994 convictions, the petitioner received a twelve-month jail sentence. Although both sentences were suspended in full, they are considered terms of imprisonment under the Act. Section 101(a)(48)(B) of the Act, 8 U.S.C. § 1101(a)(48)(B).

On appeal, counsel cites *INS v. St. Cyr*, 533 U.S. 289 (2001), in support of his claim that the petitioner's 1994 convictions cannot be retroactively deemed aggravated felonies. Counsel misinterprets *St. Cyr* and does not address pertinent federal caselaw regarding the permissible retroactive application of the aggravated felony definition, as amended by section 321 of the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

At the time of the petitioner's 1994 petit larceny convictions, her crimes did not constitute aggravated felonies under immigration law. In 1994, a theft offense became an aggravated felony if the "term of imprisonment imposed (regardless of any suspension of such imprisonment) [was] at least 5 years." Sec. 222(a) of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, 108 Stat. 4320, (Oct. 25, 1994). Section 321(a)(3) of IIRIRA replaced "five years" with "one year" in the aggravated felony definition at section 101(a)(43)(G) of the Act. Section 321(b) of IIRIRA also directed that the amended definition would apply retroactively. Section 101(a)(43), as amended by IIRIRA § 321, now states, in pertinent part, "Notwithstanding any other provision of law (including any effective date), the term [aggravated felony] applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." Section 321(c) of IIRIRA further specified that "The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred[.]" Accordingly, even though IIRIRA was enacted on September 30, 1996, over two years after the petitioner's 1994 convictions, the amended aggravated felony definition may be retroactively applied to her convictions when making a determination of her moral character for the purpose of determining her present eligibility for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

Counsel's reliance on *St. Cyr* is misguided. In *St. Cyr*, the Court held that IIRIRA § 304(b) could not be applied retroactively to bar *St. Cyr* from applying for relief from deportation under former section 212(c) of the Act, in part, because Congress did not clearly state that IIRIRA § 304(b) had retroactive effect. *St. Cyr*, 533 U.S. at 314-20. However, the Court acknowledged that IIRIRA § 321, the amended aggravated felony definition, did have retroactive effect. *Id.* at 319 ("IIRIRA's amendment of the definition of 'aggravated felony' . . . clearly states that it applies with respect to 'conviction[s] . . . entered before, on, or after' the statute's enactment date."). The Ninth Circuit Court of Appeals, within whose jurisdiction this case arose, has further held, "[I]t is settled law that the effective-date provision of the *definitional* statute, IIRIRA § 321, which defines certain crimes as aggravated felonies, applies *regardless* of the date of the commission of the crime. On that *definitional* issue, our law is clear." *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 852 (9th Cir. 2006) (emphasis in original) (citing *Aragon-Ayon v. INS*, 206 F.3d 847, 853 (9th Cir. 2000) and *St. Cyr*, 533 U.S. at 319). *Accord Sousa v. INS*, 226 F.3d 28, 33-34 (1st Cir. 2000); *Kuhali v. Reno*, 266 F.3d 93, 110-11 (2nd Cir. 2001); *Flores-Leon v. INS*, 272 F.3d 433, 439 (7th Cir. 2001).

The Court's holding in *St. Cyr* concerning the enduring availability of relief from exclusion and deportation under former section 212(c) of the Act does not directly apply to the petitioner's case. In *St. Cyr*, the Court held that relief from removal under former section 212(c) of the Act remained available to aliens whose convictions were obtained through plea agreements and who would have been eligible for section 212(c) relief at the time of their plea under the law then in effect. *St. Cyr*, 533 U.S. at 326. Although the petitioner's 1994 convictions were obtained through plea agreements, the petitioner was not eligible for relief under former section 212(c) of the Act because she was not a

lawful permanent resident with seven years of lawful, continuous and unrelinquished domicile in the United States. Section 212(c) of the Act (1994), 8 U.S.C. § 1182(c) (1994).

Counsel contends that, “[a]s the Supreme Court held in *St. Cyr*, to retroactively impose a statutory definition of IIRIRA’s would violate Petitioner’s reliance in accepting the plea bargain in her petty criminal case of preserving her eligibility of admissibility.” Even if *St. Cyr* could be analogized to the petitioner’s situation, counsel presents no evidence that the petitioner accepted the plea agreements in both of her 1994 petit larceny offenses in order to preserve “her eligibility of admissibility.” In fact, the petitioner’s convictions rendered her inadmissible under section 212(a)(2)(A)(i)(I) of the Act, which specified conviction for a crime of moral turpitude as a ground of inadmissibility in 1994, as it does today. The petitioner’s two petit larceny offenses constituted crimes of moral turpitude under BIA precedent decisions published over a decade before her convictions in 1994. *See Matter of Scarpulla*, 15 I&N Dec. at 140-41; *Matter of De La Nues*, 18 I&N Dec. at 145. Accordingly, regardless of the retroactive application of IIRIRA’s expanded aggravated felony definition, the petitioner’s offenses rendered her inadmissible for having been convicted of crimes involving moral turpitude under the immigration law in effect on the date of her convictions.

D. The Petitioner’s 2001 Conviction is an Aggravated Felony

The petitioner’s 2001 conviction further bars a finding of her good moral character pursuant to section 101(f)(8) of the Act. The petitioner was convicted of failure to appear before the court for a felony charge of petit larceny, third offense under section 19.2-128 of the Code of Virginia, which states, in pertinent part:

B. Any person (i) charged with a felony offense . . . who willfully fails to appear before any court as required shall be guilty of a Class 6 felony.

C. Any person (i) charged with a misdemeanor offense . . . who willfully fails to appear before any court as required shall be guilty of a Class 1 misdemeanor.

The petitioner’s CIS file contains a printout regarding the petitioner’s 2001 conviction from the website of Virginia Courts Case Information, the official case management system for the General District Courts of Virginia which is accessible at <http://208.210.219.132/vadistrict/select.jsp>. The record shows that the petitioner was charged with a felony offense committed on September 9, 1997. The charge was amended and the petitioner was convicted of a misdemeanor offense under section 19.2-128 of the Code of Virginia on September 6, 2001 by the Henrico County, Virginia General District Court.

The director found that the petitioner’s 2001 conviction fell under section 101(a)(43)(T) of the Act, which defines an aggravated felony as “an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years’ imprisonment or more may be imposed[.]” The petitioner was charged with failure to appear for a charge of a third offense of petit larceny, which is defined as a Class Six felony under section 18.2-104

of the Code of Virginia. Failure to appear under section 19.2-128(B) of the Code of Virginia is also a Class Six felony. Class Six felonies are punishable by a maximum term of imprisonment of five years pursuant to section 18.2-10 of the Code of Virginia. Accordingly, the petitioner's 2001 conviction constitutes an aggravated felony under section 101(a)(43)(T) of the Act and bars a finding of her good moral character pursuant to section 101(f)(8) of the Act.

On appeal, counsel claims that the petitioner is still entitled to a discretionary finding of her good moral character pursuant to section 204(a)(1)(C) of the Act² because her conviction was connected to her third husband's extreme cruelty. Although the petitioner's 2001 conviction may have been connected to D-D-'s abuse, the conviction is not encompassed by this provision. Section 204(a)(1)(C) of the Act states:

Notwithstanding section 101(f), an act or conviction that is waivable with respect to the petitioner for purposes of a determination of the petitioner's admissibility under section 212(a) or deportability under section 237(a) shall not bar the Attorney General from finding the petitioner to be of good moral character under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty.

For the purpose of determining admissibility under section 212(a) of the Act, a conviction for an aggravated felony is not waivable. On appeal, counsel presents no reasons why, and cites no evidence to show that, the petitioner's 2001 conviction is not an aggravated felony under section 101(a)(43)(T) of the Act. Because no inadmissibility waiver exists for aggravated felony convictions, section 204(a)(1)(C) of the Act does not apply to the petitioner's 2001 conviction.

The record shows that the petitioner was convicted of two crimes of moral turpitude in 1994, which are also aggravated felonies, and was convicted of an additional aggravated felony in 2001. The present record thus fails to establish the petitioner's good moral character, as required by section 204(a)(1)(A)(iii)(II)(bb) of the Act.

The present record fails to demonstrate the petitioner's eligibility for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act. Nonetheless, the case will be remanded because the director denied the petition without first issuing a NOID. The regulation at 8 C.F.R. § 204.2(c)(3)(ii) directs that CIS must provide a self-petitioner with a NOID and an opportunity to present additional information and arguments before a final adverse decision is made. Accordingly, the case will be remanded for issuance of a NOID, which will give the petitioner a final opportunity to overcome the deficiencies of her case.

² Counsel incorrectly cites this provision as "8 U.S.C.A. § 1154(C)." The correct citation in the United States Code is 8 U.S.C. § 1154(a)(1)(C). For ease of reference, we cite the corresponding section of the Act.

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.