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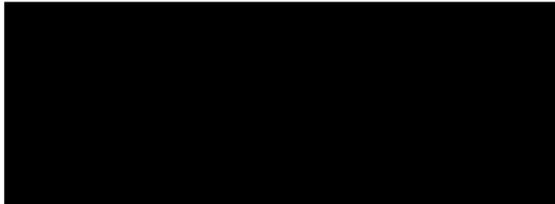
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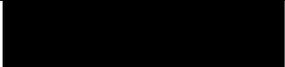


U.S. Citizenship
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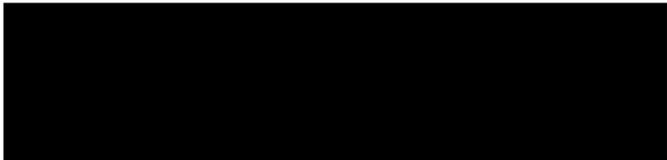
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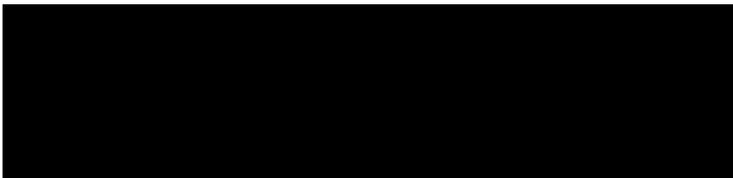
Office: VERMONT SERVICE CENTER

Date: **AUG 15 2007**

IN RE: Petitioner: 

PETITION: Petition for 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:



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 immigrant classification pursuant to section 204(a)(1)(B)(ii) of the Act, 8 U.S.C. §1154(a)(1)(B)(ii) as the battered spouse of a lawful permanent resident of the United States.

The director denied the petition finding that the petitioner failed to establish that she is a person of good moral character.

The petitioner, through counsel, filed a timely appeal and brief.

Section 204(a)(1)(B)(ii) of the Act provides that an alien who is the spouse of a lawful permanent resident of the United States may self-petition for 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 or the alien's child 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 a preference immigrant under section 203(a)(2)(A) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(B)(ii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II).

An alien whose spouse is no longer a permanent resident may still self-petition for immigration classification under section 204(a)(1)(B)(ii) of the Act if the alien demonstrates that the spouse lost status within the past 2 years due to an incident of domestic violence. See Section 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(aa)(CC)(aaa).

Section 204(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) or clause (ii) or (iii) of subparagraph (B), or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

The eligibility requirements are further explicated in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

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

* * *

(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)(B)(ii) of the Act are further explicated in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

Evidence for a spousal self-petition –

(i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

* * *

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

* * *

(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.

The petitioner is a native and citizen of Colombia. On January 28, 1992, the petitioner married J-G-,* a lawful permanent resident of the United States in Colombia. As indicated on the Form I-360, the petitioner entered the United States in September 1995 without inspection. On February 18, 1999, J-G- was found guilty of aggravated assault and false imprisonment involving the petitioner, possession of a knife during the commission of a felony, and battery.¹ The petitioner's spouse was ordered removed from the United States on April 19, 2005 due to his conviction for an aggravated felony and violence against the petitioner. The petitioner and J-G- were divorced in the Superior Court of Gwinnett County, Georgia, on August 9, 2005.² The petitioner filed this Form I-360 on August 29, 2005.

After conducting a preliminary review of the evidence submitted, the director found that the petitioner had failed to establish her prima facie eligibility and on September 9, 2005, requested the petitioner to submit evidence of her good moral character and that she married her spouse in good faith.³

On March 21, 2006, the director issued a Notice of Intent to Deny (NOID) noting that the petitioner had been convicted of a crime on two occasions. The director notified the petitioner that as the convictions were for crimes involving moral turpitude and the petitioner was not eligible for any waivers, she failed to establish that she was a person of good moral character. The petitioner, through counsel, responded to the director's NOID on May 9, 2006. After reviewing the brief submitted in response to the NOID, the director denied the petition on July 5, 2006, finding that the petitioner failed to establish that she is a person of good moral character.

The petitioner, through counsel, submitted a timely appeal. Counsel argues that the director's reliance on a conviction that fell outside of the three-year period prior to filing is contrary to the law of the 11th Circuit. As will be discussed, we are not persuaded by counsel's argument and find that the petitioner has failed to establish that she is a person of good moral character.

The record reflects the following criminal history for the petitioner:

- 1) An arrest in Gwinnett County, Georgia on February 24, 1998 for shoplifting. On May 22, 1998, the petitioner pled nolo contendere to the charge of theft by shoplifting and was given 12 months of probation, a fine, and ordered to perform community service.⁴
- 2) An arrest in Gwinnett County, Georgia on November 17, 2001 for shoplifting. On July 25, 2002, the petitioner was convicted of the charge of theft by shoplifting and was

* Name withheld to protect individual's identity.

¹ Superior Court of Gwinnett County, Georgia, Criminal Action 99-B-C755-7.

² File No.: [REDACTED]

³ The determination of prima facie eligibility is made for the purposes of 8 U.S.C. § 1641, as amended by section 501 of Public Law 104-208, which governs aliens' eligibility for public assistance and benefits. In accordance with 8 C.F.R. § 204.2(c)(6), a finding of prima facie eligibility does not relieve the petitioner of the burden of providing additional evidence in support of the petition, does not establish eligibility for the underlying petition, is not considered evidence in support of the petition and is not construed as a determination of the credibility or probative value of any evidence submitted along with that petition.

⁴ Criminal Action File No.: [REDACTED]

given 12 months of probation, a fine, and ordered to perform community service.⁵

On appeal, counsel does not dispute the director's determination that the petitioner was convicted of two crimes involving moral turpitude and that she is not eligible for a waiver. Instead, counsel argues that Citizenship and Immigration Services (CIS) is not "permitted to look beyond the statutory three (3) year period" when determining whether a petitioner has established good moral character. Counsel also argues that the director's reliance on a 1996 Service Memorandum is contrary to established law as 11th circuit precedent has found that ". . . internal memoranda 'are for the convenience of the [Service] and [do] not have the force and effect of law [sic].'" We are not persuaded by counsel's arguments.

First, as it relates to counsel's argument that the Service is not permitted to look beyond the "*statutory* three (3) year period [emphasis added]," it is apparent that counsel has attributed the language contained in the regulation to that of the statute. Although the regulation at 8 C.F.R. § 204.2(c)(2)(v) does indicate 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 three-year period immediately preceding the filing of the self-petition, the statute does not state any specific time period during which the self-petitioner must demonstrate his or her good moral character. Instead, section 204(a)(1)(B)(ii)(II)(bb) of the Act generally states that the alien must be "a person of good moral character."⁶

Second, although we cannot reject counsel's argument that, within the 11th circuit, a Service memorandum "does not have the force and effect of law," the memorandum is not the only authority which references the Service's ability to look beyond the three-year period noted in the regulation. Specifically, as indicated in the language contained in the Preamble to Interim Regulations, 61 Fed. Reg. 13061, 13066 (Mar. 26, 1996), the regulation's designation of the three-year period preceding the filing of the petition *does not* limit the temporal scope of the Service's 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. Therefore, while the director may have cited only a single Service memorandum to support a finding of a lack of good moral character due to convictions that took place before the three-year period prior to the filing of the petition, the director's actions were not erroneous. As evidenced by the interim regulation, the Service 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. In this case, the record contained evidence of the petitioner's 1998 and 2002 convictions, thus providing ample reason to believe that the self-petitioner lacked good moral character.

Pursuant to the regulations, binding administrative decisions and relevant federal case law, the petitioner's two convictions were for crimes involving moral turpitude. As previously noted, counsel does not dispute this finding.

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

⁵ Criminal Action File No.: [REDACTED]

⁶ *Contra* section 316(a) of the Act, 8 U.S.C. § 1427 which specifically references a period for which good moral character must be established by applicants for naturalization.

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 also explained 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.* In this case, turpitude is inherent in the *mens rea* of the statute of conviction, which states, in pertinent part:

- (a) A person commits the offense of theft by shoplifting when he alone or in concert with another person, with the intent of appropriating merchandise to his own use without paying for the same or to deprive the owner of possession thereof or of the value thereof

Ga. Code Ann. § 16-8-14 (West 2007).

Accordingly, the petitioner’s two convictions for shoplifting in Georgia constitute crimes involving moral turpitude and prevent a finding of her good moral character pursuant to section 101(f)(3) of the Act. *See also 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.”); *Tilley v. Page*, 181 Ga.App. 98 (1986)(finding that “shoplifting is a form of theft or larceny” and that “such offenses have previously been held to involve moral turpitude”); *Perry v. State*, 173 Ga. App. 541 (1985)(finding that larceny has been held to be a crime of moral turpitude.)

Counsel further argues that the petitioner’s convictions are waivable under section 212(h) of the Act. Again, however, counsel’s argument is not persuasive. 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 also 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 is a VAWA self-petitioner 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), neither the petitioner nor counsel has ever indicated that there was a connection between the petitioner's convictions and J-G-'s battery or extreme cruelty. It is noted that the petitioner's first conviction occurred before she claims to have even met J-G-.

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 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 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.

Beyond the director's decision, the present record also fails to establish that the petitioner resided with her spouse. Although the petitioner indicates on the Form I-360 that she resided with her spouse from September 1989 until August 1998, neither the petitioner nor any of her affiants provide any details related to their purported residence. In addition to the absence of testimonial evidence regarding her residence with her spouse, the record lacks documentary evidence such as rental receipts, leases, or utility bills to support her claims of a residence of nearly a decade. We further note that in her personal statement, the petitioner claims to have met her spouse in November 1989 and after five months of dating, moved in with him in April 1990. This testimony contradicts the claim made on the Form I-360 that they began residing together in September 1989.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.


Page 8

ORDER: The appeal is dismissed.