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

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MAR 02 2007

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC 06 006 50670

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 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 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.

The petitioner through counsel submits a timely appeal with additional evidence.

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).

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 –*
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> (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.
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> * * *
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> (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 who indicates that he entered the United States in April 1989 without inspection. On January 25, 1992, the petitioner married S-S-*, a U.S. citizen, in San Francisco, California. The petitioner filed this Form I-360 on September 30, 2005.[1] The director issued a Notice of Intent to Deny (NOID) on February 27, 2006. The director denied the petition on July 31, 2006 finding that the petitioner had been convicted of four crimes involving moral turpitude and was therefore unable to establish his good moral character. Additionally, the director determined that the petitioner failed to establish eligibility for a waiver of those convictions.

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* Name withheld to protect individual's identity.

[1] Although not at issue in this proceeding, the record also contains an approved Form I-130, Petition for Alien Relative, filed on the petitioner's behalf by his spouse.

On appeal, counsel does not dispute the director's determination that the petitioner's convictions all involved crimes of moral turpitude. Instead, counsel argues:

> The Attorney General . . . may grant protection under VAWA if a person has been battered or subjected to extreme cruelty by a spouse or parent who is or was a USC or LPR, the person has been in the United States for a continuous period of not less than three years, and can show that removal would result in extreme hardship to the person, the person's child or the person's parents. Any credible evidence may be considered. In the instant case, [redacted] submitted detailed evidence regarding the treatment suffered at the hands of his United States wife, and the hardship which would accrue to him and to his two United States children if he is forced to leave the United States. He also detailed how all of his arrests were pursuant to the battery and extreme cruelty he suffered at the hands of his United Stats [sic] citizen wife.

As will be discussed, we are not persuaded by counsel's arguments and find them insufficient to overcome the finding of the director. First, counsel makes several inaccurate assertions on appeal. For instance, while counsel refers to the authority of the Attorney General, the Attorney General has no jurisdiction over the instant petition. Rather, the authority lies with the Secretary of Homeland Security. Further, counsel's argument that the petitioner would suffer hardship if deported is irrelevant to a determination of his eligibility. On October 28, 2000, the President approved enactment of the Violence Against Women Act[2] which amended section 204(a)(1)(A)(iii) of the Act so that an alien self-petitioner claiming to qualify for immigration as the battered spouse or child of a U.S. citizen is no longer required to show that the self-petitioner's removal would impose extreme hardship on the self-petitioner or the self-petitioner's child.[3] Accordingly, the issue of extreme hardship is no longer a consideration in the Form I-360 determination. The same is true for counsel' assertion regarding the petitioner's continuous residence in the United States.

While counsel fails to refute the director's findings regarding crimes involving moral turpitude, she does argue that his arrests "were pursuant" to his spouse's abuse. Despite counsel's failure to dispute the director's findings regarding crimes involving moral turpitude, we find further discussion of this issue is warranted in order to determine the petitioner's eligibility for a waiver of those crimes. The record contains the following information about the petitioner's arrests and convictions:

> 1. A July 17, 1993 arrest under § 273.5(a) of the California Penal Code (CPC), "Inflicting Corporal Injury on Mother/Father of Defendant's Child."[4] On September 2, 1993, the petitioner pled nolo contendere and was ordered to serve 6 days in jail, with credit for the 6 days he had already served.
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> 2. A September 21, 1993 arrest under § 273.5(a) of the CPC.[5] On November 10, 1993, the

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[2] Pub. L. No. 106-386, Division B, 114 Stat. 1464, 1491 (2000).

[3] *Id.* section 1503(b), 114 Stat. at 1520-21.

[4] Felony Complaint No: [redacted], DA No: [redacted], Municipal Court of California, Santa Clara County, Sunnyvale Facility.

[5] Misdemeanor Complaint No: [redacted] DA No: [redacted], Municipal Court of California, Santa Clara County, Sunnyvale Facility.

petitioner pled nolo contendere and was ordered to serve 120 days in jail, with a credit of 13 days.

3. An April 6, 1997 arrest under CPC §§ 273.55, 242-243(e), "Battery on Spouse, Cohabitant, Parent of Child, Former Spouse, Fiance, Fiancee or Dating Relationship," and 529.5, "Deceptive Identification Card(s)."[6] The disposition submitted by the petitioner indicates that on October 16, 1997, count 2 (§ 242-243(e)) of the information was struck but does not indicate the outcome of the charges under §§ 273.55 and 529.5. The petitioner does not provide any statements regarding the outcome of the other charges.

4. A February 4, 2005 arrest under § 273.5(a) of the CPC and 242-243(e),[7] The charges against the petitioner were dismissed on July 28, 2005.

5. A May 28, 2000 arrest under § 23152(A) of the California Vehicle Code (CVC), "Willfully and Unwillfully, While Under the Influence of an Alcoholic Beverage or a Drug or Under the Combined Influence, Drive a Vehicle."[8] On September 22, 2000, the charges against the petitioner were amended and the petitioner pled nolo contendere to §§ 23152(a) and 22350 of the CVC. The petitioner was placed on 3 years of probation and sentenced to 30 days in jail.

The Petitioner Has Been Convicted of Two Crimes Involving Moral Turpitude

Although the director failed to provide a thorough discussion and analysis as to why the above-cited criminal history sufficiently establishes that the petitioner has been convicted of more than one crime involving moral turpitude, we find that the director's determination is correct.

The record reflects that on September 2, 1993 and November 10, 1993, the petitioner was convicted under § 273.5 of the CPC. The Board of Immigration Appeals has recognized that assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involved aggravating factors that significantly increased their culpability. For example, moral turpitude necessarily inheres in assault and battery offenses that are defined by reference to the infliction of bodily harm upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer, because the intentional or knowing infliction of injury on such persons reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection. *Garcia v. Att'y Gen. of U.S.*, 329 F.3d 1217, 1222 (11th Cir. 2003*)*; *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993); *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969); *Matter of Tran,* 21 I&N Dec. 291 (BIA 1996*)*(in which the alien was also convicted under section 273.5(a) of the California Penal Code); *Matter of Danesh,* 19 I&N Dec. 669 (BIA 1988). In this instance, the petitioner's offense falls within this class of cases as he was convicted under the identical

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[6] Information No: [redacted], Superior Court of California, County of Santa Clara.

[7] Misdemeanor Complaint No: [redacted], Superior Court of California, County of Santa Clara, Palo Alto Facility.

[8] Misdemeanor Complaint No: [redacted], Clerk of the Superior Court, San Mateo County.

statute as the alien in *Matter of Tran,* which was found by the BIA to be a crime involving moral turpitude.

As previously discussed, we are unable to determine the outcome of the petitioner's April 6, 1997 arrest. While we acknowledge that a conviction under § 242-243(e) of the CPC has been found *not* to involve a crime of moral turpitude,[9] it appears from the disposition submitted by the petitioner that this was the charge that was dropped or stricken. It is unclear how the remaining charges of violations under §§ 273.5 and 529.5 of the CPC were disposed of. Accordingly, we must withdraw the director's finding that the petitioner was convicted under § 273.55 and 242-243(e) on October 16, 1997.[10]

We must also withdraw the director's finding that the petitioner's September 22, 2000 convictions under §§ 23152 and 22350 (the charge added to the amended complaint) of the CVC are considered crimes involving moral turpitude. The director offered no analysis to support a finding that either of these convictions involved moral turpitude. A review of the CVC reveals that § 23152 is a "simple" driving under the influence statute that does not require any mens rea.[11] Similarly, § 22350 is a "basic speed law." As such, we do not find these violations are considered crimes involving moral turpitude. Accordingly, we must also withdraw the director's finding in relation to these convictions. However, although we have withdrawn several of the director's findings, these findings have no impact on the director's final determination. As discussed above, the record conclusively establishes that on two separate occasions the petitioner was convicted of 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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> * * *
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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 . . .
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> * * *
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> (8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43))[.]

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[9] *See In Re Sanudo,* 23 I&N Dec. 968 (2006); *Galeana-Mendoza v. Gonzalez,* 465 F.3d 1054 (concluding that the full range of conduct proscribed by California Penal Code section 243(e) does not fall within the meaning of a crime involving moral turpitude under the Act).

[10] If the record did not otherwise establish that the petitioner had already been convicted of two crimes involving moral turpitude, the record would be remanded to the director to request further evidence regarding the disposition of these charges.

[11] *See Matter of Torres-Varela,* 23 I&N Dec. 78 (BIA 2001) [finding an aggravated DUI under Arizona law was not a CIMT because the law did not require a culpable mental state].

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."

Sections 212(a)(2)(A)(ii)(II) and 204(a)(1)(C) of the Act do Not Apply to This Case

On appeal, counsel argues that the petitioner has "detailed how all of his arrests were pursuant to the battery and extreme cruelty he suffered at the hands of his United States citizen spouse." Upon review, we are not persuaded by this argument and find that the petitioner has also failed to demonstrate that despite his convictions, he warrants a discretionary finding of good moral character pursuant to section 204(a)(1)(C) of the Act. That provision grants the Service 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.

While section 212(a)(2)(A)(ii)(II) of the Act provides an exception to the classification of an alien as one convicted of a crime involving moral turpitude it only applies to aliens who have been convicted of *one crime*, for which the maximum possible penalty does not exceed one year of imprisonment and the alien was not sentenced to a term of imprisonment exceeding six months. In this instance, the petitioner has been convicted of two crimes involving moral turpitude. Accordingly, section 212(a)(2)(A)(ii)(II) of the Act is inapplicable to the petitioner's case.

Further, the record does not establish that the petitioner's convictions for domestic violence were connected to his spouse's battery or extreme cruelty. While the petitioner stated that he "never used violence against" his spouse and that "she lied to the police" in order to have him arrested, it appears that this recitation of events applies only to the petitioner's February 4, 2005 arrest that was dismissed. In a second statement, the petitioner claims that each of his arrests "was due to [his spouse's] erratic behavior." The petitioner goes on to describe *one* of his 1993 arrests and claims that his spouse "was drunk and started to use foul language" against the petitioner. The petitioner claims that he put his hand over her mouth and she "accidentally bit down and cut her own lip." The petitioner fails to provide any description of his wife's "erratic behavior" in connection to his second 1993 arrest. While the record also contains a copy of a police report dated June 3, 2000, the petitioner failed to submit any evidence to show that his spouse was ever convicted of a domestic violence against the petitioner. While we acknowledge that the petitioner suffered injuries due to his wife's behavior during one incident, his injuries appear to have been inflicted while trying to keep his spouse from hurting herself. Contrary to the petitioner's contention, a review of the police reports documenting the incidents for which the petitioner was ultimately convicted of a crime involving moral turpitude do not indicate that the petitioner's spouse was the aggressor or that she was even mutually combative in either of the instances. Therefore, the petitioner has failed to establish a connection between his September 2, 1993 and November 10, 1993 convictions and the purported abuse claimed by the petitioner. Accordingly, we find that section 204(a)(1)(C) of the Act is inapplicable to the petitioner's two convictions for domestic violence under § 273.5 of the CPC.

As discussed above, the petitioner has been convicted of two crimes involving moral turpitude and is ineligible for a waiver of these convictions. Accordingly, the director properly determined that the petitioner failed to establish that he was a person of good moral character, as required by section

204(a)(1)(A)(iii)(II)(bb) of the Act. The petitioner has failed to overcome this finding on appeal.

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.

ORDER: The appeal is dismissed.