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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 14 2007

EAC 04 220 52574

IN RE: Petitioner: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director (Director), Vermont Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a native and citizen of Benin who seeks classification as a special immigrant pursuant to section 204(a)(1)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien subjected to battery or extreme cruelty by his United States citizen spouse.

The director denied the petition because the record did not establish that the petitioner is a person of good moral character.

The petitioner, through counsel, timely appealed.

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 or a child of the alien was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

The evidentiary standard and guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are contained 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.
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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. . . . 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 at 8 C.F.R. § 204.2(c)(1)(vii) further explicates the good moral character requirement and 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 –
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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 . . . .

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 record indicates that on April 8, 1991, the petitioner pled guilty to count 4 of indictment [redacted]. The petitioner was convicted on July 26, 1991 under 42 U.S.C. § 408(g)(2), "Fraudulent Use of a Social Security Number," in the U.S. District Court for the Eastern District of New York.[1] The petitioner was sentenced to four months in jail and two years of supervised probation. The petitioner was also ordered to pay $50. On July 18, 1997, the petitioner married [redacted][2] a U.S. citizen, in Brooklyn, New York. On November 7, 1997, the petitioner's spouse filed a Form I-130, Petition for Alien Relative, on the petitioner's behalf. The petitioner filed a Form I-485, Application to Adjust Status, on that same date. The Form I-130 petition and the Form I-485 application were denied on July 16, 2003 for abandonment. The petitioner filed his Form I-360 on July 23, 2004. Finding the evidence submitted with the Form I-360 insufficient to establish the petitioner's eligibility, the director issued a notice on February 28, 2005 requesting the petitioner to submit evidence of his good moral character. On May 2, 2005, the petitioner submitted additional evidence. On August 10, 2005, the director issued a Notice of Intent to Deny (NOID). The petitioner responded to the NOID on September 27, 2005. On January 24, 2006, the director denied the petition finding that the petitioner's criminal conviction was for a crime involving moral turpitude, and therefore, that the petitioner was unable to establish that he is a person of good moral character.

The petitioner, through counsel, submits a timely appeal with a brief. On appeal, counsel does not dispute the director's finding that the petitioner was convicted of a crime involving moral turpitude. Instead, counsel states

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[1] Case number: CR-91-00061(S).

[2] Name withheld to protect individual's identity.

that the director fails to provide any support for "an exception to the general 3-year rule" and argues that the Act only requires the petitioner to establish good moral character for the 3-year period preceding the filing of the petition. We are not persuaded by counsel's arguments. First, contrary to counsel's assertion that section 204 of the Act requires a petitioner to establish that "he has been a person of good moral character (GMC) for the period of time *beginning three years prior to the day he filed his Form I-360 Self-Petition* [Emphasis added]," the statute contains no specific language regarding the period of time in which a petitioner must establish good moral character. Unlike the statute and regulations referenced by counsel pertaining to eligibility for naturalization, which specifically establish a "requirement of good moral character during the statutory period,"[3] there is no similar provision in the instant statute or regulation. Instead, Section 204(a)(1)(A)(iii)(II)(bbb) of the Act states generally that the alien must be "a person of good moral character."

Counsel's mistaken assertion regarding the 3-year "statutory period" appears to be based upon the regulatory language at 8 C.F.R. § 204.2(c)(2)(v) which indicates that a petitioner should submit police clearances for each place he or she has resided "during the three year period immediately preceding the filing of the self-petition." Despite the regulation's designation of a 3-year period preceding the filing of the petition, however, the temporal scope of the Service's inquiry into the petitioner's good moral character is not limited to this 3-year period. Citizenship and Immigration Services (CIS) 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 (March 26, 1996). Accordingly, the fact that the petitioner's conviction occurred more than three years prior to the filing of the petition does not mean that director is precluded from considering such conviction.[4]

Although counsel fails to provide any argument contesting the finding that the petitioner's conviction for Fraudulent Use of a Social Security Number under 42 U.S.C. § 408(g)(2) was a crime involving moral turpitude, a review of the statute under which the petitioner was convicted and the relevant case law warrants further discussion. Although the petitioner failed to submit the relevant sections of the United States Code (U.S.C.) under which he was convicted, it appears that section 408(g)(2) of the U.S.C. was amended in 1990 and recodified at 42 U.S.C. § 408(a)(7)(B) which states, in pertinent part:

> § 408. Penalties
>
> (a) In general
>
> Whoever - -
>
> ***
>
> (7) for the purpose of causing an increase in any payment authorized under this subchapter (or any other program financed in whole or in part from Federal funds), or for the purpose of causing payment under this subchapter (or any such other program) to be made when no payment is authorized thereunder, or for the purpose of obtaining (for himself or any

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

[4] It is also noted that the naturalization regulation allows the Service to take into account the alien's conduct and acts at any time prior to the statutory period if the applicant's conduct during the statutory period does not reflect a reform of character or if the earlier acts or conduct appear relevant to a determination of the alien's present good moral character. *See* 8 C.F.R. § 316.10(a)(2).

> other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose - -
>
> ***
>
> (B) with intent to deceive, falsely represents a number to be the social security number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person;
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> ***
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> shall be guilty of a felony and upon conviction thereof shall be fined under Title 18 or imprisoned for not more than five years, or both.

The record reflects that on April 8, 1991, the petitioner pled guilty to count 4 of the previously discussed indictment which states that the petitioner:

> [D]id knowingly and with the intent to deceive falsely represent a number to be the social security account number assigned to him . . . when in fact such number was not assigned to him.

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).

Offenses involving fraud have been found to fall squarely within the jurisprudential definition of crimes involving moral turpitude. As the Supreme Court stated in *De George*,

> Whatever else the phrase "crime involving moral turpitude" may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . The phrase "crime involving moral turpitude" has without exception been construed to embrace fraudulent conduct.

De George, 341 U.S. at 232. The federal courts of appeals and the BIA repeatedly cite *De George* as authority for the principle that crimes of which fraud is an element necessarily involve moral turpitude. *See e.g. Padilla v. Gonzales*, 397 F.3d 1016, 1020 (7th Cir. 2005) ("[I]t is settled that 'crimes in which fraud [is] an ingredient' involve moral turpitude," quoting *De George.*), *Flores*, 17 I&N Dec. at 228 (quoting the above cited passage of *De George* as the Supreme Court's definition of moral turpitude). Moreover, in *Matter of Adetiba*, 20 I&N Dec. 506, the BIA upheld an immigration judge's determination that a conviction under 42 U.S.C. § 408 (falsely representing a social security number), the crime of which the petitioner was convicted, is a crime involving moral turpitude. *See also Correa-Garces*, 20 I&N Dec. 451, 454 (BIA 1992) ("Crimes involving fraud are considered to be crimes involving moral turpitude."). Indeed, even when fraud is not an explicit statutory

element of an offense, a crime will still be found to involve moral turpitude if fraud is inherent to the proscribed offense. *Matter of Flores*, 17 I&N Dec. at 228, *Matter of Bart*, 20 I&N Dec. 436, 437-438.

However, despite this statutory history regarding fraud, in *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000), the 9th Circuit overturned the BIA's determination that a conviction under 42 U.S.C. § 408(g) was a crime involving moral turpitude. Beltran-Tirado was convicted under former section 42 U.S.C. § 408(g)(2) for providing a false attestation on an employment verification form for the purpose of obtaining employment at a restaurant in California.[5] In finding that the BIA's determination that [redacted] was convicted of a crime involving moral turpitude was in error, the 9th Circuit focused on the fact that Beltran-Tirado, a registry applicant, used a false social security number in order to obtain employment and "did not attempt to create any liability for [another] in any of these transactions; [redacted] used the card to establish her own credit." In overturning the BIA's determination that [redacted] had been convicted of a crime involving moral turpitude, the 9th Circuit relied on the legislative history related to Congress' 1990 amendment of 42 U.S.C. § 408 and noted that Congress created a new subsection which specifically exempted aliens who had been granted permanent resident status under amnesty or registry from prosecution for past use of false social security card numbers if the alien used the false numbers "to engage in otherwise lawful conduct" such as obtaining employment.[6] The Court also noted that "Congress was careful to exclude from the exemption those "who used a false social security number for otherwise illegal activity such as bank fraud or drug trafficking'" and those "who sold social security cards, possessed social security cards with intent to sell, possessed counterfeit social security cares with intent to sell or counterfeited social security cards with intent to sell." While the 9th Circuit acknowledged that the new subsection was not applicable to [redacted] the Court found that the subsection's "rationale illuminated the view of Congress concerning the lack of moral turpitude involved in [redacted] actions." The 9th Circuit concluded by stating that:

> Section 408(d), in the light of its legislative history, establishes that *use of a false Social Security number to further otherwise legal behavior is not a crime of "moral turpitude" when the user is granted amnesty or registry without first having been convicted for the behavior.* The only reason that Beltran would not be immunized by § 408(d) upon being granted registry relief is that her crimes were committed a few weeks too late and she had already been convicted of them.

[Emphasis added.]

Although [redacted] was convicted under the same statute as the petitioner, the petitioner has failed to establish a set of facts similar to those in *Beltran-Tirado*. This is important because the 9th Circuit's holding that a conviction under 42 U.S.C. § 408(a)(7)(B) is not considered a crime involving moral turpitude is limited to instances where the use of the false security number was "to further otherwise legal behavior." In this instance, the petitioner pled guilty to "knowingly and with the intent to deceive falsely represent a number to be the social security account number assigned to him . . . ." The petitioner failed to submit any evidence to establish that his use of the social security number was to further otherwise legal behavior like that in *Beltran-Tirado,* as opposed to illegal activity such as bank fraud or drug activity. Further, as

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[5] Beltran-Tirado was also convicted of violating 18 U.S.C. § 1546(b)(3). However, that conviction is not at issue here.

[6] *See Beltran-Tirado* at 5655, citing Conference Report at 948, 1990 U.S.C.C.A.N. at 263 and 42 U.S.C. § 408(d)(2).

distinguished from the alien in *Beltran-Tirado*, the petitioner is not an applicant for amnesty or registry, a fact the 9th Circuit found so compelling due to the legislative history and subsequent amendment to § 408 exempting amnesty and registry applicants from prosecution for "certain past use" of false Social Security numbers. Because the petitioner is not a registry or an amnesty applicant and because he has failed to show that his use of a false social security number was "to further otherwise legal behavior," the 9th Circuit's holding is inapplicable to the instant case and the petitioner's conviction is found to be a crime involving moral turpitude. This conviction precludes a finding of his good moral character pursuant to section 101(f)(3) of the Act as he is an alien described in section 212(a)(2)(A)(i)(I) of the Act, as an alien convicted of "a crime involving moral turpitude."[7]

While we have reviewed the petitioner's claim of a "clear record of law-abiding conduct and clear evidence of reformation," none of these facts extinguish his criminal record and his resultant statutory ineligibility pursuant to sections 101(f)(3) and 212(a)(2)(A) of the Act as an alien convicted of a crime involving moral turpitude. The petitioner's subsequent conduct does not determine whether his crimes involved moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Rather, it is the "inherent nature of the crime as defined by statute and interpreted by the courts, and as limited and described by the record of conviction, which determines whether the offense is one involving moral turpitude." *Bart*, 20 I&N Dec. at 437, *Short*, 20 I&N Dec. at 137. Consequently, the petitioner's reform of character is irrelevant to this determination. The petitioner has failed to present any evidence which would establish that the actions which resulted in his conviction were, like the alien in *Beltran-Tirado,* in the furtherance of "otherwise legal behavior" such as obtaining employment. Accordingly, we concur with the director's determination that the petitioner was convicted of a crime involving moral turpitude and therefore, that he is statutorily barred from establishing that he is a person of good moral character pursuant to section 101(f)(3) of the Act.

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 38 years old at the time he committed his offense. As such, this exception is inapplicable.

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). 42 U.S.C. § 408 mandates a penalty of imprisonment of not more than five years maximum. Although the petitioner was not sentenced to five years of imprisonment, the statutory provisions under which he was convicted prescribe a maximum possible penalty of up to five years of imprisonment. Accordingly, the second exception to section

[7] It is noted that even if the 9th Circuit did not specifically limit its holding that a conviction under § 408 does not involve moral turpitude if the Social Security number was used to further otherwise legal behavior, the AAO would not be bound by the Court's holding. A federal agency is obligated to follow circuit precedent in cases originating within that circuit only. As the appeal before us is for a case that originates outside the geographical confines of the 9th Circuit, its precedent is not binding on the AAO. *See Abdulai v Ashcroft,* 239 F.3d 542, 553 (3d Cir. 2001).

212(a)(2)(A)(ii) of the Act does not encompass the petitioner.

We are also unable to find the petitioner to be a person of good moral character pursuant to the discretionary provision enacted by Title V of the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, Pub. L. 06-386. Section 204(a)(1)(C) of the Act, as amended by the VTVPA, provides CIS with the discretion to find a petitioner to be a person of good moral character if: 1) the petitioner's conviction for a crime involving moral turpitude is waivable for the purposes of determining admissibility or deportability under section 212(a) or section 237(a) of the Act; and 2) the conviction was connected to the alien's battery or subjection to extreme cruelty by his or her U.S. citizen or lawful permanent resident spouse or parent. Section 204(a)(1)(C) of the Act, 8 U.S.C. § 1154(a)(1)(C). Although inadmissibility due to a conviction for a crime involving moral turpitude is waivable for self-petitioners under section 212(h)(1)(C) of the Act, the petitioner's conviction was not connected to his battery or subjection to extreme cruelty by his U.S. citizen spouse. The petitioner was convicted of offenses that were committed on or about January 1991. In his affidavit, the petitioner states that he met his U.S. citizen spouse in 1995. The submitted certificate attests to the couple's marriage on July 18, 1997. Hence, the record clearly shows that the petitioner's conviction was unrelated and in no way connected to any battery or extreme cruelty later inflicted upon him by his spouse. We are thus barred from finding the petitioner to be a person of good moral character as a matter of discretion pursuant to section 204(a)(1)(C) of the Act.

The record shows that the petitioner has been convicted of a crime involving moral turpitude and is not a person of good moral character pursuant to section 101(f) of the Act. Based on the present record, the petitioner is consequently ineligible for immigrant classification under section 204(a)(1)(A)(iii) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.