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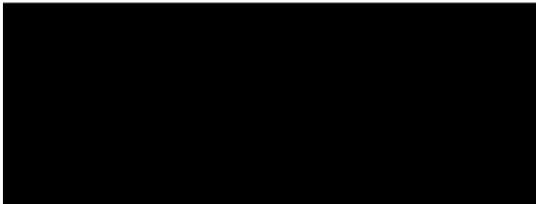
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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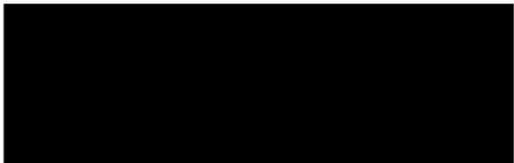
Office: VERMONT SERVICE CENTER

Date: **AUG 04 2009**

IN RE: [REDACTED]

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

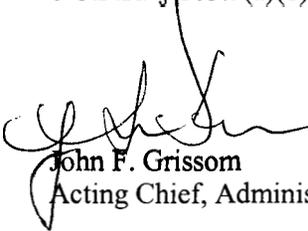
ON BEHALF OF PETITIONER:



**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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director 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 under 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 citizen of the United States.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that he is a person of good moral character.

Counsel submitted a timely appeal on February 23, 2009.

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).

Section 204(a)(1)(J) of the Act, 8 U.S.C. § 1154(a)(1)(J) 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 of Homeland Security].

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

- (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 guidelines for a self-petition filed under section 204(a)(1)(A)(iii) of the Act are explained further at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part, the following:

*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.

The record of proceeding establishes the following pertinent facts and procedural history. The petitioner is a citizen of Mexico who entered the United States, without inspection, in or around February 1992. He married L-Z,<sup>1</sup> a citizen of the United States, on February 6, 2001.

L-Z- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on February 23, 2001. The petitioner filed Form I-485, Applicant to Register Permanent Residence or Adjust Status, on that same date. Upon notice from the legacy Immigration and Naturalization Service (INS) that he was inadmissible to the United States, the petitioner filed Form I-601, Application for Waiver of Grounds of Inadmissibility, on March 26, 2002. The legacy INS denied the Form I-601 on June 17, 2003. The AAO dismissed the petitioner's appeal from the denied Form I-601 on February 17, 2006.

The petitioner filed the instant Form I-360 on July 2, 2007. On March 7, 2008, the director issued a request for additional evidence, and requested documentation to establish that the petitioner is a person of good moral character. The petitioner responded to the director's request on June 2, 2008.

After considering the evidence of record, the director denied the petition on August 6, 2008, and remailed his decision on January 22, 2009. Upon review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition.

### **Good Moral Character**

The sole issue on appeal is whether the petitioner has established that he is a person of good moral character. As noted previously, the regulation at 8 C.F.R. § 204.2(c)(1)(vii) states, in pertinent part, 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, 8 U.S.C. § 1101(f), states, in pertinent part, the following:

(f) For the purposes of this chapter--

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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<sup>1</sup> Name withheld to protect individual's identity.

- (3) a member of one or more of the classes of persons, whether inadmissible or not, described in . . . subparagraphs (A) . . . of section 1182(a)(2) of this title. . . .

\* \* \*

- (8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section.

The fact that any person is not within any of the forgoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

The “classes of persons” referenced at section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3) includes these described at section 212(a) of the Act, 8 U.S.C. § 1182(a), in pertinent part, as follows:

- (a) Classes of aliens ineligible for visas or admission

\* \* \*

- (2) Criminal and related grounds

- (A) Conviction of certain crimes

- (i) In general

Except as provided in clause (ii),<sup>2</sup> any alien convicted of, or who admits to having committed, or who admits having committing acts which constitute the essential elements of—

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime. . . .

\* \* \*

is inadmissible.

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<sup>2</sup> The exceptions referenced at section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i) do not apply here.

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

Section 204(a)(1)(A)(iii)(II)(cc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(cc) prescribes no specific period during which good moral character must be established.

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 three-year period immediately preceding the filing of the self-petition. However, the regulation's designation of the three-year period preceding the filing of the petition does not limit the temporal scope of USCIS'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. *See* Preamble to Interim Regulations, 61 Fed. Reg. 13061, 13066 (Mar. 26, 1996). In this case, the record contained evidence that the petitioner was convicted of two felonies in 1997, thus providing ample reason to believe that he lacked good moral character.

*The Petitioner's Criminal Offenses were Crimes Involving Moral Turpitude*

The record demonstrates that the petitioner was convicted of two felonies on June 24, 1997: (1) infliction of corporal injury to a cohabitant under California Penal Code § 273.5(a); and (2) willful harm or injury to a child under California Penal Code § 273a(a).

California Penal Code § 273.5(a) states the following:

*§ 273.5 Willful infliction of corporal injury; violation; punishment*

- (a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.

Cal. Penal Code Ann. § 273.5(a) (West 1989).

California Penal Code § 273a(a) states the following:

*§ 273a Willful harm or injury to child; endangering person or health; punishment; conditions of probation*

- (a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

Cal. Penal Code Ann. § 273a(a) (West 1989).

Pursuant to the regulations, binding administrative decisions, and relevant federal case law, the petitioner's criminal offenses constitute crimes involving moral turpitude. As was noted previously, 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)(3) of the Act, and one of the "classes of persons" referenced at section 101(f)(3) of the Act includes those convicted of crimes involving moral turpitude. Sections 101(f)(3) and 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. §§ 1101(f)(3), 1182(a)(2)(A)(i)(I).

The term "crime involving moral turpitude" is not defined in the Act or the regulations, but has been part of the immigration laws of the United States since 1891. *Jordan v. De George*, 341 U.S. 223, 229 (1951) (noting that the term first appeared in the Act of March 3, 1891, 26 Stat. 1084). The Board of Immigration Appeals (BIA) has explained that moral turpitude "refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Franklin*, 20 I&N Dec 867,868 (BIA 1994), *aff'd*, 72 F.3d 571 (8<sup>th</sup> Cir. 1995). 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). A crime involving moral turpitude must involve both reprehensible conduct and some degree of scienter, be it specific intent, deliberateness, willfulness or recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n.1, 706 (A.G. 2008).

When determining whether a crime involves moral turpitude, the statute under which the conviction occurred controls. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)(citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)); *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *Matter of Silva-Trevino*, 24 I&N Dec. at 696. A categorical analysis of the elements of the statute of conviction also includes an examination of the law of the convicting jurisdiction to determine if there is a "realistic probability" that the statute would be applied to conduct that does not involve moral turpitude. *Matter of Louissaint*, 24 I&N Dec. at 757 (citing *Matter of Silva-Trevino*, 24 I&N Dec. at 698). Such a realistic probability exists when there is an actual case in which the criminal statute was applied to conduct that did not involve moral turpitude. *Id.* If no realistic probability exists that the statute of conviction would be applied to

conduct that does not involve moral turpitude, then convictions under the statute may categorically be treated as crimes involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. at 697.

In *Grageda v. INS*, 12 F.3d 919, 922 (9<sup>th</sup> Cir.1993), the Ninth Circuit Court of Appeals held that violation of California Penal Code § 273.5(a) constitutes a crime involving moral turpitude, stating the following:

Because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements, we hold that spousal abuse under section 273.5(a) is a crime of moral turpitude

Accordingly, the AAO finds that the petitioner's conviction under California Penal Code § 273.5(a) constitutes a crime involving moral turpitude, and prevents a finding of his good moral character pursuant to section 101(f)(3) of the Act.

The AAO turns next to the petitioner's second felony conviction: his conviction under California Penal Code § 273a(a). It does not appear as though the Ninth Circuit Court of Appeals has directly addressed whether violation of California Penal Code § 273a(a) constitutes a crime involving moral turpitude. However, the AAO does note that it has examined California Penal Code § 273d in order to determine whether a conviction under that provision constitutes a crime involving moral turpitude. California courts have held that child abuse under section 273d of the California Penal Code categorically involves moral turpitude, *see, e.g. People v. Brooks*, 3 Cal. App. 4th 669, 671-72 (Cal. App. 3<sup>rd</sup> Dist. 1992), and the Ninth Circuit Court of Appeals held in *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969), that a conviction under that provision is a crime involving moral turpitude. The court in *Guerrero de Nodahl* stated that "we find that inflicting 'cruel or inhuman corporal punishment or injury' upon a child is so offensive to American ethics that the fact that it was done purposely or willingly (the California definition of 'willful') ends debate on whether moral turpitude was involved." *Id.* at 1406-07.

A cursory reading of California Penal Code § 273a(a) indicates that a conviction under the statute always requires (1) reprehensible conduct: (a) either causing or permitting a child to suffer, or inflicting unjustifiable physical pain under circumstances likely to produce great bodily harm or death; (b) causing or permitting the person or health of a child to be injured while having care or custody of the child; or (c) causing or permitting a child to be placed in a situation where the child's person or health is endangered); and (2) knowledge (willful causation or permission). Cal. Penal Code Ann. § 273a(a) (West 1989). A conviction under California Penal Code § 273a(a), therefore, constitutes a crime involving moral turpitude. It does not appear as though a conviction under section 273a(a) could be obtained where the underlying conduct did not involve moral turpitude.

The record contains testimony from both L-Z- and the petitioner describing the circumstances surrounding the petitioner's arrest. However, "collateral attacks upon an [applicant's] conviction

do not operate to negate the finality of his conviction unless and until the conviction is overturned.” *In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (citations omitted.) Moreover, the AAO cannot go behind the judicial record to determine the guilt or innocence of an alien. *See id.* In *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980), the BIA held that the Service cannot go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense. A record of conviction constitutes a conviction for immigration purposes. The petitioner can only appeal such a conviction within the court system.

In accordance with the above discussion, the AAO finds that both of the petitioner’s 1997 convictions constituted crimes involving moral character.

*The Relevant Exception Does Not Apply*

Section 212(h)(1)(c)(2) of the Act, 8 U.S.C. § 1182(h)(1)(C)(2), 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, 8 U.S.C. § 1154(a)(1)(C), allows USCIS 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 sections 212(h)(1)(A) and (C) of the Act, 8 U.S.C. § 1182(h)(1)(A), (C), no connection exists between the petitioner’s convictions stemming from the 1997 incidents and L-Z’s battery or extreme cruelty, because the petitioner’s convictions occurred prior to the abuse described by the petitioner in his testimony occurred. The petitioner submits no testimony or other evidence that his conviction was in any way connected to L-Z’s battery or extreme cruelty. The petitioner is consequently ineligible for an exceptional finding of his good moral character pursuant to section 204(a)(1)(C) of the Act.

Counsel’s assertions on appeal fail to overcome the director’s decision. Although counsel submits a nine-page appellate brief, he does not discuss the issue of the petitioner’s good moral character until, which was the basis of the denial, until the eighth page. Rather, most of the appellate brief was devoted to the issue of battery or extreme cruelty, which was not part of the director’s decision; the director did not dispute that the petitioner had been subjected to abuse. Again, the sole basis of the director’s denial was the issue of the petitioner’s failure to demonstrate that he is a person of good moral character. Moreover, even within counsel’s

one-page discussion of the issue of good moral character, he failed to raise the issues of moral turpitude or the relevant waiver, which were the basis of the director's decision with regard to good moral character.

Accordingly, the AAO finds that the petitioner has failed to overcome the decision of the director. He has failed to establish that he is a person of good moral character.

### **Conclusion**

The AAO agrees with the director's determination that the petitioner has failed to establish that he is a person of good moral character, which bars a finding of his good moral character pursuant to section 101(f) of the Act. The record demonstrates that the petitioner was convicted of two crimes involving moral turpitude. The petitioner, therefore, is ineligible for immigrant classification pursuant to section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), and the petition must be denied.

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 sustained that burden.

**ORDER:** The appeal is dismissed.