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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 07 184 50031

Office: VERMONT SERVICE CENTER

Date: JUL 09 2009

IN RE: [REDACTED]

PETITION: Petition for Immigrant Abused 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:

SELF-REPRESENTED¹

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.

hn F. Grissom
Acting Chief, Administrative Appeals Office

¹ Although the appeal was prepared by an attorney, the Form G-28, Notice of Entry, was not signed by the petitioner. The AAO faxed a notice to the attorney's office on May 21, 2009, and requested that a signed Form G-28 be sent to the AAO within seven days. However, no response was received. Accordingly, the attorney will not receive notice of this proceeding.

DISCUSSION: The service center director denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further action.

The petitioner seeks immigrant classification under section 204(a)(1)(B)(ii) of the Act, 8 U.S.C. § 1154(a)(1)(B)(ii), as an alien battered or subjected to extreme cruelty by a lawful permanent resident of the United States.

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

The petitioner filed a timely appeal on November 18, 2008.

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 he or she demonstrates that the marriage to the lawful permanent resident spouse was entered into 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 spouse of an alien lawfully admitted for permanent residence 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).

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 last entered the United States, without inspection, on or around March 20, 1990. She married R-C-,² a lawful permanent resident of the United States, on July 20, 1998. R-C- filed Form I-130, Petition for Alien Relative, on behalf of the petitioner on April 30, 2001.

The petitioner filed the instant Form I-360 on June 11, 2007. The director issued a request for additional evidence on February 26, 2008 and requested additional evidence to establish that the petitioner had a qualifying relationship with a citizen or lawful permanent resident of the United States; that she shared a joint residence with R-C-; and that she is a person of good moral character. The director also requested information regarding the petitioner's daughter. The petitioner responded to the director's request on May 22, 2008. After considering the evidence of record, the director denied the petition on October 24, 2008.

Good Moral Character

The sole issue on appeal is whether the petitioner has established that she 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 –

* * *

(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. . . .

* * *

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.

² Name withheld to protect individual's identity.

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),³ 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.

The record contains evidence that the petitioner was convicted in California of two crimes involving moral turpitude:

- The record indicates that the petitioner was arrested on February 13, 1992 in Alameda County, California. She was charged with, and pleaded guilty to, the crime of petty theft as defined at California Penal Code § 484(a). According to the May 21, 2008 letter from the Fremont Superior Court, successfully completed all terms of her probation on March 3, 1994.
- The record indicates that the petitioner was arrested on October 9, 1993 in Santa Clara County, California. She was charged with, and pleaded *nolo contendere* to, the crime of petty theft as defined at California Penal Code §§ 484(a) and 488. The document from

³ 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 Municipal Court of California, Santa Clara County Judicial District, indicates that she was sentenced to a ten-day jail sentence, and three years of probation.

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

On the Form I-290B, which was received at the service center on November 18, 2008, the petitioner states that the director erred in denying the petition, and that “the crimes for which [she] was denied all occurred outside the time period necessary for determination of good moral character.” The petitioner’s argument, however, is misplaced, as the statute at issue in this case prescribes no specific period during which good moral character must be established. *See* section 204(a)(1)(A)(iii)(II)(cc) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(cc).

The regulation at 8 C.F.R. § 204.2(c)(2)(v) states that primary evidence of a self-petitioner’s good moral character includes local police clearances or state-issued criminal background checks from each place where the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. However, the regulation’s designation of the three-year period preceding the filing of the petition does not limit the temporal scope of USCIS’ inquiry into the petitioner’s good moral character. The agency may investigate the self-petitioner’s character beyond the three-year period when there is reason to believe that the self-petitioner lacked good moral character during that time. *See* Preamble to Interim Regulations, 61 Fed. Reg. 13061, 13066 (Mar. 26, 1996). In this case, the record contained evidence of the petitioner’s convictions stemming from the 1992 and 1993 incidents, thus providing ample reason to believe that the self-petitioner may lack good moral character.

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

Pursuant to the regulations, binding administrative decisions, and relevant federal case law, the petitioner’s crimes of petty theft 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 (8th Cir. 1995). The BIA has further held that “[t]he test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind. An evil or malicious intent is said to be the

essence of moral turpitude.” *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980) (internal citations omitted). 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.

The record is sufficient to establish that the petitioner’s offenses of petty theft are crimes involving moral turpitude. The record indicates that the petitioner violated California Penal Code § 484(a) during both incidents, and that she also violated California Penal Code § 488 in the 1993 incident.

California Penal Code § 484(a) states, in pertinent part, the following:

§ 484. Theft defined

- (a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

Cal. Penal Code Ann. § 484(a) (West 1989).

California Penal Code § 486 states that theft is divided into two degrees: grand theft and petty theft. *Id.* at § 486. Sections 487, 487a, 487b, and 487i define grand theft; none of those sections describe the petitioner’s crime. *Id.* at § 487. Section 488 states that “[t]heft in all other cases is petty theft.” *Id.* at § 488.

The California Supreme Court has held that a conviction for theft under section 484(a) of the California Penal Code requires the intent to permanently deprive the owner of possession of the property. *People v. Davis*, 19 Cal. 4th 301, 307 (Cal. 1998) (upholding defendant's conviction for petty theft under section 484(a)). The Ninth Circuit Court of Appeals and the Board of Immigration Appeals (BIA) have held that such a specific intent renders theft a crime involving moral turpitude. See *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999); *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."); *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."). The petitioner's actions of 1992 and 1993, therefore, constituted crimes involving moral turpitude, and prevent a finding of her good moral character pursuant to section 101(f)(3) of the Act.

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 1992 and 1993 incidents and R-C-'s battery or extreme cruelty, because the petitioner's convictions occurred several years before their July 20, 1998 marriage.

While the record indicates that the applicant has been rehabilitated, no connection exists between the petitioner's convictions stemming from the 1992 and 1993 incidents and R-C-'s battery or extreme cruelty because the petitioner's convictions occurred in California several years before their 1998 marriage, and the petitioner does not indicate that she knew her husband at the time she committed those offenses.

Conclusion

The AAO concurs with the director's determination that the petitioner has failed to establish that she is a person of good moral character. However, the record indicates that the director did not issue a notice of intent to deny the petition (NOID) before he issued his decision. Although the record establishes that the petitioner is ineligible for the benefit sought, the petition must be remanded, solely on procedural grounds, so that the petitioner has the opportunity to respond to a NOID. The petition must be remanded to the director for issuance of a NOID in compliance with the regulation in effect at 8 C.F.R. § 204.2(c)(3)(ii)⁴ on the date this petition was filed, and the director must afford the petitioner the opportunity to submit a response. On remand, the

⁴ USCIS promulgated a rule on April 17, 2007 related to the issuance of requests for evidence and NOIDs. 72 Fed. Reg. 19100 (Apr. 17, 2007). The rule became effective on June 18, 2007, after the filing of this petition on June 11, 2007.

director need only address the issues before the AAO on appeal; i.e., whether the petitioner has demonstrated that she is a person of good moral character.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's October 24, 2008 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.