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U.S. Citizenship and Immigration Services
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U.S. Citizenship
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Office: VERMONT SERVICE CENTER

Date: MAR 30 2009

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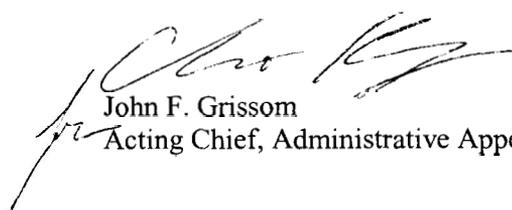
PETITION: Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:

[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.

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 approved the immigrant visa petition. However, upon receipt of additional information the director issued a notice of intent to revoke, and ultimately did revoke, approval of the petition. 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 United States citizen.

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 August 10, 2007.

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 Guatemala who entered the United States, without inspection, on or around

November 10, 1988. He filed a Form I-589, Request for Asylum in the United States, on November 26, 1990. The petitioner married M-G-,¹ a United States citizen, on May 4, 1999.

The petitioner filed the instant Form I-360 on December 22, 2005. On February 28, 2006, the director issued a request for additional evidence to establish that he is a person of good moral character. The petitioner responded to the director's request on April 17, 2006. The director approved the petition on May 30, 2006.

The petitioner appeared for an interview in connection with his permanent residency petition on July 24, 2006. At that interview, the petitioner provided information indicating that he had been convicted for petty theft and felony child abuse in California. The director issued a notice of intent to revoke approval of the petition on April 25, 2007. The petitioner responded on June 21, 2007. After considering the evidence of record, the director revoked approval of the petition on July 23, 2007. On appeal, counsel submits a brief. Upon review of the entire record of proceeding, the AAO agrees with the director's revocation decision.

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 –

* * *

(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.

¹ Name withheld to protect individual's identity.

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),² 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.

Before addressing the evidence of record regarding the petitioner’s criminal history in the State of California, the AAO will turn first to the petitioner’s criminal history in the State of Georgia, the state in which he currently resides. The AAO agrees with the director’s determination that none of the petitioner’s arrests in the State of Georgia have any bearing on the instant petition. The traffic-related incidents are not crimes involving moral turpitude, or aggravated felonies, and the AAO agrees with the director’s conclusion that the other incidents were “connected” to the battery and/or extreme cruelty suffered by the petitioner.

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

² 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 record indicates that the petitioner was arrested on December 10, 1989, in Ventura County, California. According to the crime report, the petitioner was charged with the misdemeanor crime of petty theft. The petitioner was alleged to have stolen two audio cassettes from a K-Mart store. According to the August 2 and August 16, 2006 letters from the Ventura County Superior Court, misdemeanor criminal records over five years old, and cases pertaining to infractions over three years old, are destroyed in California. Accordingly, the case, with disposition, has been destroyed, and no records are available. However, documentation in the file, including a computer screenprint entitled [REDACTED] indicates that the petitioner was in fact convicted of this crime, and the “disposition code” indicates that he was sentenced to probation.³ Also, the AAO notes that the petitioner was arrested on two occasions – September 3, 1991 and February 5, 1993 – for violating the terms of his parole that stemmed from this incident. Further, the petitioner does not dispute that he was convicted of this crime.
- The record indicates that the petitioner was arrested on May 20, 1991 in Ventura County, California. According to the crime report, the petitioner was charged with the felony crime of child abuse. The crime report states the following: “Known suspect injured child by pulling ear and giving child a one inch laceration on back of ear.” The August 2 and August 16, 2006 letters referenced previously indicate that further records for this case are unavailable, as they have been destroyed. Again, documentation in the file, including a computer screenprint entitled [REDACTED]” indicates that the petitioner was in fact convicted of this crime, and the “disposition code” indicates that he was sentenced to probation, as well as either “jail, prison, or CYA [California Youth Authority].”⁴ Further, the petitioner does not dispute that he was convicted of this crime.

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

In his December 5, 2007 appellate brief, counsel contends that the director erred “when looking beyond the statutory period of three years for determining good moral character,” and cites to caselaw affirming that so long as the petitioner demonstrates good moral character during the statutory period, the benefit sought cannot be denied based upon a prior criminal record. Counsel’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

³ The [REDACTED]” screenprint states that the documents for this case were destroyed on January 24, 1995.

⁴ The [REDACTED] screenprint states that the documents for this case were destroyed on September 23, 1996.

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 1989 and 1991 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 and child abuse 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 1989 offense of petty theft is a crime of moral turpitude. Both the crime report and the "[REDACTED]" screenprint state that the petitioner violated California Penal Code § 484(a) which 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. Further, the crime report itself describes the petitioner's crime as petty theft. Accordingly, the AAO concludes that the petitioner's conviction stemming from his December 10, 1989 theft of two audio cassette tapes was for petty theft.

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 December 10, 1989, therefore, constitute a crime involving moral turpitude and prevent a finding of his good moral character pursuant to section 101(f)(3) of the Act.

The record is also sufficient to establish that the petitioner's 1991 conviction of child abuse is a crime involving moral turpitude. Both the crime report and the "[REDACTED]"

screenprint state that the petitioner violated California Penal Code § 273d⁵ which states, in pertinent part, the following:

§ 273d. Corporal punishment or injury of child; felony; punishment; enhancement for prior conviction; condition of probation.

- (a) Any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition is guilty of a felony. . . .

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. 3rd Dist. 1992). The Ninth Circuit Court of Appeals also held in *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969), that a conviction under California Penal Code § 273d 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. Although the petitioner states in one of his affidavits that he was babysitting for a neighbor’s daughter; that he grabbed the girl’s ear to keep her from falling twenty feet off of a balcony to the ground; that he was told by the hospital that he was responsible because the girl was under his care; and, that the girl’s mother told everyone it was not his fault; the record indicates, nonetheless, that he was convicted of violating Calif. Penal Code § 273d. “[C]ollateral 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.) The AAO cannot go behind the judicial record to determine the guilt or innocence of an alien. *See id.* The petitioner’s actions of May 20, 1991, therefore, constitute a crime involving moral turpitude and further prevent a finding of his good moral character pursuant to section 101(f)(3) of the Act.

Counsel asserts on appeal that the director committed error in failing to consider the hardship that the petitioner’s two United States citizen children would face if the petitioner were removed from the United States. Although counsel cites no support in the Act for his assertion, the AAO presumes he is referring to section 212(h) of the Act. Section 212(h) of the Act allows the discretionary waiver of the inadmissibility bar due to a conviction for a crime of moral turpitude if

⁵ The AAO acknowledges that the crime report identifies “273(d)P.C./Child Abuse” as the code section at issue here, stating that “known suspect injured child by pulling ear and giving child a one inch laceration on back of ear.” However, it is Calif. Penal Code § 273d, and not Calif. Penal Code § 273(d), which addresses the willful infliction of cruel or inhuman corporal punishment or injury on a child resulting in a traumatic condition. Calif. Penal Code § 273(d), on the other hand, addresses unlawfully obtained maternity-related financial benefits from two or more prospective adoptive families. It is apparent, however, that the petitioner was charged with, and convicted of, violating Calif. Penal Code § 273d, which is a crime of child abuse. The MUSIC Archive – Case Search” screenprint states that the petitioner was convicted of “273D” and, further, the petitioner himself has testified that his conviction was for abuse to a child.

an immigrant establishes that his or her denial of admission would cause extreme hardship to his or her U.S. citizen or lawfully resident spouse, parent, son or daughter. However, section 212(h)(1)(B) of the Act is inapplicable to the petitioner because he is not an immigrant.

Counsel overlooks the relevant subsection at section 212(h)(1)(c)(2) of the Act, 8 U.S.C. § 1182(h)(1)(C)(2), which states that the inadmissibility bar due to a conviction for a crime of moral turpitude may be waived if:

- (C) the alien is a VAWA self-petitioner; and
- (2) the [Secretary of Homeland Security], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Section 204(a)(1)(C) of the Act, 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 1989 and 1991 incidents and M-G-'s battery or extreme cruelty, because the petitioner's convictions occurred several years before their May 4, 1999 marriage.

While the record indicates that the applicant has been rehabilitated, no connection exists between the petitioner's convictions stemming from the 1989 and 1991 incidents and M-G-'s battery or extreme cruelty because the petitioner's convictions occurred in California several years before their May 4, 1999 marriage in Alabama, and the petitioner does not indicate that he knew his wife at the time he committed those offenses.

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. 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.