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**U.S. Department of Justice**

Immigration and Naturalization Service

*OFFICE OF ADMINISTRATIVE APPEALS*
*425 Eye Street N.W.*
*ULLB, 3rd Floor*
*Washington, D.C. 20536*

[redacted]

**Public Copy**

FILE: [redacted] EAC 00 078 53472 Office: Vermont Service Center Date: JUN 8 2001

IN RE: Petitioner: [redacted]
Beneficiary:

APPLICATION: 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)

IN BEHALF OF PETITIONER:

STEVE POLATNICK
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MIAMI FL 33176

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The petitioner is a native and citizen of Peru who is seeking 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 the battered spouse of a United States citizen.

The director determined that the petitioner failed to establish that she is a person of good moral character. The director, therefore, denied the petition.

On appeal, counsel asserts that the director erred in assessing legal effect of the petitioner's arrest followed by nolle prosequi.

8 C.F.R. 204.2(c)(1) states, in pertinent part, that:

> (i) A spouse may file a self-petition under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act for his or her classification as an immigrant relative or as a preference immigrant if he or she:
>
> > (A) Is the spouse of a citizen or lawful permanent resident of the United States;
> >
> > (B) Is eligible for immigrant classification under section 201(b)(2)(A)(i) or 203(a)(2)(A) of the Act based on that relationship;
> >
> > (C) Is residing in the United States;
> >
> > (D) Has resided in the United States with the citizen or lawful permanent resident spouse;
> >
> > (E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage;
> >
> > (F) Is a person of good moral character;
> >
> > (G) Is a person whose deportation (removal) would result in extreme hardship to himself, herself, or his or her child; and

> (H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

The petition, Form [redacted] shows that the petitioner last entered the United States as a visitor on April 29, 1997. The petitioner married her United States citizen spouse on [redacted] On January 14, 2000, a self-petition was filed by the petitioner claiming eligibility as a special immigrant alien who has been battered by, or has been the subject of extreme cruelty perpetrated by, her U.S. citizen spouse during their marriage.

8 C.F.R. 204.2(c)(1)(i)(F) requires the petitioner to establish that she is a person of good moral character. Pursuant to 8 C.F.R. 204.2(c)(2)(v), 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 for each locality or state in the United States in which the self-petitioner has resided for six or more months during the three-year period immediately preceding the filing of the 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.

The director determined that the petitioner failed to establish that she is a person of good moral character. He noted that because the petitioner furnished a police clearance under her maiden name only, she was requested on June 8, 2000 to submit a police clearance using both her maiden and married names. In response, the petitioner furnished court documents reflecting that on [redacted] she was arrested and charged with "burglary to auto." The director noted that it appears from the report that the petitioner admitted to being a willing lookout for the burglary of a tourist automobile, and based on a felony conviction, she failed to demonstrate her qualification under the provisions for good moral character.

On appeal, counsel asserts that the petitioner's arrest did not lead to a prosecution as the charges were nolle prossed on July 5, 2000. He states that "nolle pros" means the case was not prosecuted. He further asserts that the director's statement that the petitioner has a felony conviction is a gross error as it does not meet the definition of "conviction" in the Immigration Act.

The arrest report dated May 26, 2000, states, in part:

> Def. (petitioner) was a "lookout" & willing participant in burglary to victim's car. Co-def. [redacted] used a

> screw-driver to enter vehicle. Def. gave tape statements to same. Crime witnessed by writer (officer).

Counsel argues that there is no admission of improper act, and that a careful reading of the arrest report shows a conclusory statement by a policeman that the petitioner was a look-out while another defendant opened a care with a screwdriver. He states that the report is unclearly phrased: "[redacted] used a screw-driver to enter vehicle. Def. gave taped statements to same." Counsel further states that this is no "admission" by the petitioner, as the director carelessly read it to be. He argues that the words could mean that [redacted] himself admitted breaking into the vehicle, or they could mean that the petitioner gave a statement that [redacted] broke into the vehicle.

Counsel further argues that the petitioner's affidavit of April 11, 2000 stating that she had never been arrested was not an attempt to deceive the Service. He states that in fact, as of that date, she had not been arrested; she was arrested on May 26, 2000.

8 C.F.R. 204.2(c)(1)(vii) provides, in 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. 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 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.

Section 101(f) of the Act, 8 U.S.C. 1101(f), 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 establish, is, or was--
>
> (3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of section 212(a) of this Act; or subparagraphs (A) and (B) of section 212(a)(2) and subparagraph (C) thereof of such section....if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period....
>
> The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

Burglary is a crime involving moral turpitude where the object of the unlawful entry or presence is to commit a crime involving moral turpitude, and such conviction or admission may render the petitioner inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. 1182(a)(2)(A)(I). [redacted] 254 F.2d 81 (D.C. Cir. 1958); [redacted] 2 I&N Dec. 721 (BIA 1946).

The police report does not show the intention of the unlawful entry or presence of the petitioner and co-defendant in the automobile. Further, the record reflects that the petitioner was not convicted of the charge, but rather, the court entered a "nolle pros" on the case on July 5, 2000. Therefore, the charge of burglary of auto, in this case, does not satisfy the grounds required for a finding of a lack of good moral character pursuant to section 101(f) of the Act, 8 U.S.C. 1101(f). The petitioner has, therefore, overcome this finding of the director pursuant to 8 C.F.R. 204.2(c)(1)(i)(F).

The director did not find the petitioner ineligible under any other provisions of 8 C.F.R. 204.2(c).

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 met that burden. The appeal will be sustained.

**ORDER:** The appeal is sustained.