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U.S. Citizenship
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[REDACTED]

FILE:

MSC-06-089-13134

Office: LOS ANGELES

Date:

JUN 04 2008

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, and *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the District Director, Los Angeles. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director determined that the applicant had been convicted of three misdemeanors. Therefore, she found he was not eligible to adjust status to that of a temporary resident and she denied his application.

On appeal, the applicant's attorney asserts that the director erred in stating that two of his three convictions were misdemeanors. Specifically, he argues that his 1987 conviction for trespassing, and his 1990 conviction for petty theft were not misdemeanors. His attorney argues that the California Penal Code does not clearly authorize imprisonment of more than five days for violations under §§ 602(j) and 488.

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Section 245A(b)(1)(C) of the Immigration and Nationality Act (Act) provides that the applicant “*must establish* that he is (i) is admissible . . . and (2) *has not been convicted* of any felony or 3 or more misdemeanors.”

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

At issue in this proceeding is whether the applicant is ineligible to adjust status to that of a temporary resident because he has been convicted of three or more misdemeanors. Here, the applicant is ineligible to adjust to temporary resident status because he has three misdemeanor convictions.

The record reveals the following offenses:

1. On or about January 1987, the applicant was convicted of trespassing in violation of California Penal Code § 602(j), a misdemeanor. Here, the applicant was sentenced to 36 months of probation. (Date of arrest January 22, 1987; Case Number unknown)
2. On November 1, 1990, the applicant was convicted of one count of petty theft, under California Penal Code § 488, which can be charged as a misdemeanor or as an infraction, at the discretion of the prosecutor, provided that the individual that charges are brought against has no other theft-related conviction. Here, the record shows the offense was charged as a misdemeanor. It is noted that at the time of this arrest, the name used by the applicant was [REDACTED] (Date of arrest: September 16, 1990; Case Number [REDACTED])
3. On April 1, 2003, the applicant pled guilty to and was convicted of one count of battery against a current or former spouse, under California Penal Code § 243(e)(1), a misdemeanor. It is noted that the name the applicant provided as his own at the time of this arrest was [REDACTED]. However, on the date of his hearing, the court amended the complaint against the applicant to show his true name. (Date of Arrest March 29, 2003; Case Number [REDACTED])

On May 12, 2006, the Director of the Los Angeles District denied the application because the applicant had been convicted of three misdemeanors in the United States. She found that he was therefore ineligible to adjust to temporary resident status.

On appeal, the applicant's attorney argues that the applicant's convictions for both petty theft and trespassing were not misdemeanors. He argues that therefore, he continues to be eligible to adjust status to that of a temporary resident.

Specifically, the applicant's attorney argues the following: The applicant's attorney asserts that the September 1990 misdemeanor conviction for petty theft should not be considered a misdemeanor conviction because the charge under which the applicant was convicted is not punishable by imprisonment for any term. Counsel's assertion is not persuasive. The record shows that the applicant was given a sentence of 36 months probation. Petty theft is punishable by imprisonment for up to six months in jail. *See* section 490 of the California Penal Code.

The record shows that the applicant was, in fact, charged and convicted of a misdemeanor offense in this case. Therefore, the AAO finds the applicant was convicted of a crime that was punishable as a misdemeanor.

The applicant's attorney further asserts that applicant's trespassing conviction under section 602 of the California Penal Code (CPC) is an infraction rather than a misdemeanor because the CPC does not explicitly authorize imprisonment of a person convicted under CPC § 602.

However, it is noted here that California Penal Code § 602 states that:

Except as provided in paragraph (2) of subdivision (v), subdivision (x), and Section 602.8, every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:

(j) Building fires upon any lands owned by another where signs forbidding trespass are displayed at intervals not greater than one mile along the exterior boundaries and at all roads and trails entering the lands, without first having obtained written permission from the owner of the lands or the owner's agent, or the person in lawful possession.

Therefore, the AAO finds that the language of the California Penal Code, as noted above explicitly states that a violation under section 602(j) is a misdemeanor.

The applicant contends that his conviction for battery against a spouse or former spouse is a misdemeanor. For reasons noted above, the AAO finds that the applicant was convicted for two other offenses that are punishable a misdemeanors. Therefore, this applicant is found to be

ineligible to adjust to temporary resident status pursuant to both section 245(a)(4)(B) of the Act and 8 C.F.R. § 245a.2(c)(1).

In summary, the record confirms that the applicant has been convicted of three misdemeanors. The sections of the California Penal Code and California Vehicle Code cited by the applicant's cited by the applicant's attorney do not establish that the crimes of which the applicant has been convicted are not misdemeanors. The applicant's criminal record renders him ineligible for temporary resident status pursuant to section 245A(a)(4)(B) of the Act.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility