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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office MS2090
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U.S. Citizenship
and Immigration
Services

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FILE:

XOX 88 162 02022

Office: LOS ANGELES

Date:

FEB 02 2010

IN RE:

Applicant:



APPLICATION:

Application for Temporary Resident Status under Section 210 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:



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. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to section 210 of the Immigration and Nationality Act, 8 U.S.C. § 1160, was denied by the director, Los Angeles, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director initially denied the application, finding the applicant had failed to appear for one or more scheduled interviews. The director reopened and issued a notice of intent to deny (NOID), informing the applicant of discrepancies in the evidence, and that he had failed to establish his eligibility for temporary resident status. The director further informed the applicant he was ineligible for temporary resident status because he was inadmissible due to a conviction for a crime involving moral turpitude (CIMT).

On appeal, the applicant asserts his conviction for spousal abuse is not a CIMT and that the discrepancies in the evidence are not material.

In order to be eligible for temporary resident status as a special agricultural worker, an alien must have engaged in qualifying agricultural employment for at least 90 man-days during the twelve-month period ending May 1, 1986, and must be otherwise admissible under the provisions of section 210(c) of the Act and not ineligible under 8 C.F.R. § 210.3(d). 8 C.F.R. § 210.3(a). An applicant has the burden of proving the above by a preponderance of the evidence. 8 C.F.R. § 210.3(b).

On the I-705 affidavit filed in support of the Form I-700 application, the applicant claimed to have worked for 103 days irrigating, hoeing, and picking chili for [REDACTED] between May 6, 1985 and December 17, 1985. [REDACTED] submitted a notarized affidavit dated May 2, 1988, that stated the applicant was employed for the above dates to clean, hoe, and pick chili.

However, the record contains a second notarized affidavit from [REDACTED] dated November 4, 1988. This affidavit states that the applicant was employed harvesting a variety of crops, including chili, squash, broccoli, cauliflower, beets, and beans.

Next, the record contains a sworn statement from the applicant dated July 9, 2007, wherein he states that his farm labor was limited to "picking broccoli and putting them in boxes." The notes from the applicant's interview confirm this information in the applicant's sworn statement. In contrast, the Form I-700 states that the applicant farm labor was limited to harvesting chili.

Generally, 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. § 210.3(b)(1). Evidence submitted by an applicant will have its sufficiency judged according to its probative value and credibility. 8 C.F.R. § 210.3(b)(2). Personal testimony by an applicant that is not corroborated, in whole or in part, by other credible evidence (including testimony by persons other than the applicant) will not serve to meet an applicant's burden of proof. 8 C.F.R. § 210.3(b)(3).

There is no mandatory type of documentation required with respect to the applicant's burden of proof; however, the documentation must be credible. All documents submitted must have an appearance of reliability, i.e., if the documents appear to have been forged, or otherwise deceitfully created or obtained, the documents are not credible.

The AAO has reviewed all of the documents in the file, and has considered the applicant's assertions on appeal. The applicant has the burden of proof to establish his eligibility by a preponderance of the evidence. 8 C.F.R. § 210.3. On the Form I-700, the applicant indicated that he worked with chili alone. At an interview, he indicated he worked with broccoli alone. The applicant has not explained these discrepancies. Thus, the evidence calls into question the credibility of the applicant's claims regarding the terms and conditions of his employment. The AAO affirms the director's determination that the discrepancies are material and undermine the applicant's credibility; ergo, the applicant has failed to establish he performed at least 90 man-days of qualifying agricultural employment during the eligibility period.

The next issue to address is whether the applicant's criminal history renders him ineligible for temporary resident status. An applicant is ineligible for temporary residence if he or she has been convicted of any felony or three or more misdemeanors in the United States. 8 C.F.R. § 210.3(d)(3). An applicant is inadmissible and therefore ineligible for temporary resident status if he has been convicted of a crime involving moral turpitude. 8 C.F.R. § 245a.2(c)(3).

According to the evidence in the record, on December 26, 1997, the applicant pleaded guilty to one count of violating section 273.5 of the California Penal Code – spousal abuse. [REDACTED] The applicant was sentenced to 36 months probation. Thereafter, the applicant violated the terms of his probation and was sentenced to serve 84 days in jail on March 7, 2001.

On January 23, 2008, the applicant pleaded guilty to one count of violating section 23152(b) of the California Vehicle Code – more than .08% blood alcohol. [REDACTED]. The applicant was sentenced to 36 months probation.

The applicant's failure to observe the terms of probation is not considered a separate conviction. Therefore, the applicant has two misdemeanor convictions and is not ineligible for temporary resident status on criminal grounds.

The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has had occasion to discuss the immigration consequences of a conviction under section 273.5(A) of the California Penal Code. In *Morales-Garcia v. Holder*, ___ F.3d ___, (9th Cir. 2009) (2009 WL 1532189) the court ruled that a conviction under this section of the criminal statutes is not *categorically* a "crime involving moral turpitude" because the statute is overbroad, in that it criminalizes behavior that is not inherently "base, vile, and depraved," or "conduct that shocks the conscience and is contrary to the societal duties we owe each other." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1069 (9th Cir. 2007) (en banc). The court in *Morales* noted that a conviction under section 273.5(A) of the California Penal Code also included convictions for "some perpetrator-victim relationships that were more akin to strangers or acquaintances."

However, the court in *Morales-Garcia v. Holder* noted that certain sections of California Penal code 273.5(A) proscribe behavior that would fall within the ambit of a CIMT. The court noted that spousal abuse was one such area, and that a conviction under section 273.5(A) that specifically identified *spousal abuse* would be considered a conviction for a CIMT. The *Morales* court cited to its own earlier precedent to confirm that a conviction under section 273.5(A) of the California Penal Code that was limited to spousal abuse would be a conviction for a CIMT. *See Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993). The *Morales* court stated that *Grageda* resolved only one issue: whether spousal abuse is a [CIMT] upon the basis of which an alien can be deported. *Grageda v. INS*, 12 F.3d at 920. The *Grageda* court answered that question in the affirmative, holding that a conviction under section 273.5(A) is a CIMT. *Id.* at 922.

In the instant case, the court documents identify the applicant's violation of section 273.5(A) as one of spousal abuse. Therefore, because the applicant was convicted under the spousal abuse section of 273.5(A) of the California Penal Code, he stands convicted of a CIMT. An alien with *one* CIMT is not inadmissible if he or she meets the petty offense exception.¹ *See* 8 U.S.C. § 1182(a)(2)(A)(ii).

We turn now to an analysis of the documentary evidence in support of his Form I-700 application for temporary residence under the seasonal agricultural worker program. Generally, 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. § 210.3(b)(1). Personal testimony by an applicant that is not corroborated, in whole or in part, by other credible evidence will not serve to meet an applicant's burden of proof. 8 C.F.R. § 210.3(b)(3). The applicant has the burden of proof to establish his eligibility by a preponderance of the evidence. 8 C.F.R. § 210.3.

The AAO has reviewed all of the documents in the file, and has considered the applicant's assertions on appeal. The applicant has the burden of proof to establish his eligibility by a preponderance of the evidence. 8 C.F.R. 210.3(b)(1). We note that the applicant submitted two employment verification letters from [REDACTED] one dated May 5, 1988, and the second dated November 4, 1988. The first letter specifies that the applicant was hired to harvest chili, while the second letter appears to be a general letter of employment that lists all of the crops harvested by all of [REDACTED] farm laborers. As such, it is not specific to the applicant, and does not verify his employment for the requisite time.

¹ A CIMT will meet the petty offense exception if “the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months.” *Lafarga v. INS*, 170 F.3d 1213, 1214-15 (9th Cir. 1999) (quoting 8 U.S.C. § 1182(a)(2)(A)(ii)(II)); *see also Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843-46 (9th Cir. 2003).

Additionally, the applicant stated on the Form I-700 and the Form I-705 that he was employed harvesting chili during the requisite time period. However, the applicant signed a sworn affidavit during his interview that he was employed "picking broccoli and putting them in boxes," and the notes from the interview confirm this statement. The conflict between his application and sworn affidavit undermines the overall credibility of the applicant's claim and is not satisfactorily resolved on appeal.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The applicant has failed to credibly establish the performance of at least 90 man-days of qualifying agricultural employment during the twelve-month statutory period ending May 1, 1986. Consequently, the applicant is ineligible for adjustment to temporary resident status as a special agricultural worker.

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