U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529–2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: AUG 1 4 2013 Office: SAN DIEGO

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

FILE: [redacted]

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
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, San Diego, California. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On January 5, 2005, the applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act). In a decision dated January 14, 2013, the director denied the application, finding that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period.

On appeal, the applicant asserts that he has established his unlawful residence for the requisite time period.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

An applicant for temporary resident status must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term "until the date of filing" in 8 C.F.R. § 245a.2(b)(1) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

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).

An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to temporary resident status. 8 C.F.R. § 245a.2(c)(1); section 245A(a)(4)(B) of the INA.

"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 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).

In addition, an applicant is inadmissible, and therefore ineligible for temporary resident status, if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

The first issue to be determined in this proceeding is whether the applicant has furnished sufficient credible evidence that he has no disqualifying criminal convictions, and is thus otherwise admissible to the United States. A review of the record reveals that the applicant has failed to meet this burden because of his criminal convictions for crimes involving moral turpitude.

Section 212(a)(2)(A) of the Act provides, in pertinent part:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits 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.

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). *See Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas–Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute "criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied." *Marmolejo-*

Campos, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); *see also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude." *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). To demonstrate a "realistic probability," the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probably also exists where the statute expressly punishes conduct not involving moral turpitude. *See U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the "limited, specified set of documents" that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz,* 466 F.3d at 1132-33); *see also Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas–Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. *See Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

The record reflects that on December 6, 1999, the applicant was convicted in the Superior Court of California, County of [redacted] of petty theft, a misdemeanor in violation of section 484 of the California Penal Code. He was sentenced to one day in jail with credit to time served, was placed on informal probation for a period of three years, was ordered to pay $600 in fines, and was ordered to complete 40 hours of community service.

At the time of the applicant's conviction for petty theft, Cal. Penal Code § 484(a) provided, in pertinent part:

> 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 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 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. . . .

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974) (stating, "It is well settled

that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . .."); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, "Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].") However, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484 is a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a), and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). Consequently, the AAO finds that the applicant's conviction for theft under section 484 of the California Penal Code is categorically a crime involving moral turpitude which renders him inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

Counsel for the applicant indicates, in response to a Request for Evidence dated May 15, 2013, that the applicant's petty theft conviction was vacated. The record reflects that on April 4, 2005, the applicant filed with the court a motion to dismiss charges pursuant to section 1203.4 of the California Penal Code. On May 27, 2005, the Superior Court of California, County of [redacted] ordered that the applicant's plea of guilty be withdrawn, that probation and all terms and conditions of sentencing be vacated, and that the case be dismissed pursuant to section 1203.4 of the California Penal Code.

However, under the current statutory definition of conviction provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). We therefore note that a state court's expungement of the applicant's conviction under the aforementioned statute does not eliminate the immigration consequences of his criminal conviction. This particular section of the California Penal Code is a rehabilitative type of statute, which serves to dismiss, cancel, or vacate a prior conviction as a result of the successful completion of a term of probation, restitution, or other condition of sentencing. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board's determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001). In general, a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type of rehabilitative statute, unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Thus, the court's order of May 27, 2005, that expunged the applicant's misdemeanor conviction under section 1203.4 of the California Penal Code is ineffective to remove the immigration effect of the underlying conviction.

We note that the applicant would have been eligible for the "petty offense exception" had the

December 6, 1999 petty theft offense been his sole criminal conviction. However, the record reflects that the applicant has another conviction, which renders him ineligible for the exception as set forth in section 212(a)(2)(A)(ii)(II) of the Act.

The record shows that on March 23, 2001, the applicant was convicted in the Superior Court of California, County of of "petty theft with prior sentence," a misdemeanor in violation of section 666 of the California Penal Code. The applicant was sentenced to one day in jail with credit to time served, was placed on probation for three years, and was ordered to pay a restitution fine in the amount of $100.

California Penal Code § 666 provides, in pertinent part, that:

> Notwithstanding Section 490, any person described in paragraph (1) who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496, and having served a term of imprisonment therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, who is subsequently convicted of petty theft, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

The California offense of petty theft is found in section 484(a) of the California Penal Code. The Board in *Matter of Pedroza* determined that misdemeanor petty theft under section 484 of the California Penal Code constitutes a crime involving moral turpitude. 25 I&N Dec. 312, 315-16 (BIA 2012). Additionally, as previously discussed, the Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) is a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a), and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). Consequently, the AAO finds that the applicant's conviction for petty theft with a prior under Cal. Penal Code § 666 is a crime involving moral turpitude which renders him inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. As the applicant is inadmissible for having been convicted of two crimes involving moral turpitude, he is ineligible for the petty offense exception found in section 212(a)(2)(A)(ii) of the Act.

Though the record reflects that on May 22, 2012, the Superior Court of California, County of Courthouse ordered the guilty plea vacated and the case dismissed pursuant to section 1203.4 of the California Penal Code, we once again note that a state court's expungement of the applicant's conviction under the aforementioned statute does not eliminate the immigration consequences of her criminal conviction. *See Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). Thus, the court's order of May 22, 2012, that expunged the applicant's misdemeanor "theft with a prior" conviction under section 1203.4 of the California Penal Code is ineffective to remove the immigration effect of the underlying conviction.

Accordingly, the petitioner is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of two crimes involving moral turpitude, and this constitutes an additional basis for denial of the application. Consequently, the AAO need not discuss at this time whether the applicant submitted sufficient evidence to establish by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period.

In light of the conviction record, the applicant is not eligible for temporary resident status on account of his two crime involving moral turpitude convictions, which render him inadmissible to the United States. Section 245(a)(4)(A) of the Act. No waiver of such ineligibility is available. Accordingly, the AAO shall not disturb the director's decision terminating the applicant's temporary resident status as the director's decision is affirmed on other grounds.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's January 14, 2013 decision is affirmed. The appeal is dismissed.