U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES Date: JUL 09 2009
MSC-02-008-61700

IN RE: Applicant: [redacted]

APPLICATION: Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (2000), *amended by* Life Act Amendments, Pub. L. 106-554, 114 Stat. 2763 (2000).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application based on the determination that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because he had been convicted of two crimes involving moral turpitude (CIMT) in California. The director also concluded that the applicant had submitted insufficient credible, relevant evidence of physical presence and continuous residence in the United States for the requisite period. The director found that the applicant was not eligible for permanent residence under the terms of the LIFE Act. *Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant is represented by counsel on appeal. Counsel maintains that the applicant has "met his burden of proof by providing five acceptable affidavits but the same have not been examined and [evaluated] properly and fairly." Counsel does not contest the fact of the applicant's two convictions for crimes involving moral turpitude, but avers that, as the applicant is not convicted of a felony or three misdemeanor offenses, "the inadmissibility on grounds of two crimes of mortal turpitude ... does not apply in this case."

Section 1104(c)(2)(B) of the LIFE Act states:

(i) In General – The alien must establish that the alien entered the United States before January 1, 1982, and that he or she has resided continuously in the United States in an unlawful status since such date and through May 4, 1988. In determining whether an alien maintained continuous unlawful residence in the United States for purposes of this subparagraph, the regulations prescribed by the Attorney General under section 245A(g) of the Immigration and Nationality Act (INA) that were most recently in effect before the date of the enactment of this Act shall apply.

An applicant for permanent resident status under section 1104 of the LIFE Act has the burden to establish by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States and is otherwise eligible for adjustment of status under this section. 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.12(e).

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. 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 applicant 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 applicant has satisfied the standard of proof. See U.S. v. Cardozo-Fonseca, 480 U.S. 421 (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.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. See 8 C.F.R. § 245a.2(d)(3)(vi)(L).

Furthermore, an alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. 8 C.F.R. § 245a.18(c)(1). "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).

Additionally, an applicant who has been convicted of a crime involving moral turpitude (CIMT) is inadmissible, and therefore ineligible for temporary resident status. But, an alien with one CIMT is not inadmissible if he or she meets the petty offense exception. *See* 8 U.S.C. § 1182(a)(2)(A)(ii). 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). For the purpose of the petty offense exception, "'the maximum penalty possible' . . . refers to the statutory maximum sentence, not the guideline sentence to which the alien is exposed." *Mendez-*

Mendez v. Mukasey, 525 F.3d 828, 835 (9th Cir. 2008) (offense of bribery of a public official did not qualify for petty offense exception where statutory maximum for offense was 15 years). [1]

In this case, the record contains a photocopy of a probation report issued by the Stanislaus County Municipal Court dated August 24, 1994. The report identifies [redacted] and indicates that the applicant pleaded guilty to two counts of violating section 243.4(D)(1) of the California Penal Code: section 243.4(D)(1) – *Intimate Touching for Purposes of Sexual Arousal of Institutionalized Person.* Two counts of violating section 242 of the California Penal Code – *Battery*, were dismissed pursuant to the terms of a plea agreement.

The record also contains a letter from the Stanislaus County Sheriff's Department dated January 14, 2003. The letter provides a summary of the local arrest record for the applicant: on June 11, 1994, the applicant was arrested by the Ceres Police Department, Stanislaus County, California and charged with one count of violating section 243.4(B) of the California Penal Code – *Sexual battery of Institutionalized Person.*

The record before the AAO also contains a photocopy of an order from the Stanislaus County Superior Court dated April 27, 2004, granting the applicant's petition to dismiss a conviction pursuant to section 1203.4 of the California Penal Code. The Case number is identified as [redacted]. The order does not identify any provision of the California Penal Code, or the date of the conviction vacated under this order. Attached to the court's order vacating a conviction is a minute order that lists a different case number: [redacted] and a different section of the California Penal Code: section 243.4(D)(1) – *Intimate Touching for Purposes of Sexual Arousal of Institutionalized Person.*

From the three documents listed above, the AAO infers that the applicant was convicted in August, 1994 for two counts of two counts of violating section 243.4(D)(1) of the California Penal Code: section 243.4(D)(1) – *Intimate Touching for Purposes of Sexual Arousal of Institutionalized Person.* It also appears both counts were ultimately dismissed pursuant to California's rehabilitation statute, section 1203.4 of the California Penal Code. This section of the California Penal Code serves to vacate a conviction and dismiss criminal charges subsequent to some form of court ordered restrictions, including a successful completion of rehabilitation and counseling.

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[1] Additionally, an applicant for admissibility who stands convicted of a CIMT may be eligible for the youthful offender exception if: the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States. 8 U.S.C. § 1182(a)(2)(A)(ii)(I.). The applicant does not assert that he is eligible for the youthful offender exception and we note that neither offense was not committed when the applicant was under 18 years of age.

The AAO notes that the record also contains a federal criminal background investigation report generated on November 15, 2005, that lists the two convictions noted above, as well as an additional arrest on or about April 7, 1996. This record, and a photocopy of a criminal record history issued by the Kern County Sheriff's Department on December 27, 2002, indicate that the applicant was arrested on April 7, 1996, by the Bakersfield Sheriff's Department and charged with one count of violating section 245(a)(1) of the California Penal Code – *assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury.* This charge was ultimately dismissed when the arresting authorities failed to present the applicant before a magistrate within 48 hours of arrest.

Notwithstanding the affidavits submitted by the applicant to prove physical presence and continuous residence, the threshold issue in this case is whether the applicant's two criminal convictions which appear to have been dismissed in 2004 remain valid convictions for immigration purposes. The AAO has reviewed the statute under which the applicant was convicted, the court records and conviction documents, as well as the precedent authority of the Ninth Circuit Court of Appeals, which is the jurisdiction in this case. The AAO concludes that the convictions remain valid and that they disqualify the applicant for lawful permanent resident status.

Initially, we note that both convictions involve crimes of moral turpitude. The Ninth Circuit has explained that a crime of moral turpitude involves "base, vile, and depraved 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). Sexual offenses, other than statutory rape, are generally considered to be crimes of moral turpitude. *See Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007); *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994). A conviction for some form of sexual battery involving an institutionalized person is clearly conduct that is "contrary to the societal duties we owe each other." *Navarro-Lopez, supra.* Therefore, the applicant's convictions fall under the category of crimes involving moral turpitude. Because the applicant has two convictions for crimes of moral turpitude, the petty offense exception, which is available for one conviction for a CIMT, is not available in this case.

What remains for discussion is the effect of the trial court's dismissal of the convictions. The Ninth Circuit Court of Appeals has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute.[2] Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty

[2] See Murillo-Espinoza v. INS, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); Ramirez-Castro v. INS, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); see also de Jesus Melendez v. Gonzales, 503 F.3d 1019, 1024 (9th Cir. 2007); Cedano-Viera v. Ashcroft, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

or nolo contendere and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, there is no evidence in the record to suggest that the applicant's convictions were expunged because of an underlying procedural defect in the merits of the case, and the vacated judgments remain valid for immigration purposes.

The applicant has two convictions for crimes involving moral turpitude. There is no waiver available for these convictions and they are an automatic disqualification for adjustment to permanent resident status under the provisions of the LIFE Act.

The AAO concludes that the applicant is ineligible for permanent resident status pursuant to the terms of the LIFE Act, as he cannot establish that he is otherwise admissible to the United States on account of his convictions for two crimes involving moral turpitude. The AAO therefore need not examine whether the applicant has established the requisite residency requirements.

ORDER: The appeal is dismissed.[3] This decision constitutes a final notice of ineligibility.

[3] The record also contains an unadjudicated Application for Waiver of Grounds of Excludability (Form I-690) filed on July 11, 2005. The applicant seeks a waiver of excludability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 212(a)(6)(A)(i) (illegal entrant). Inasmuch as we are dismissing the appeal, the AAO declines to remand the Form I-690 for consideration.