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20 Mass. Ave. N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:

MSC-05-204-11137

Office: LOS ANGELES

Date:

SEP 18 2008

IN RE:

Applicant:

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:

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.

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 denied the application because the applicant had been convicted of three or more misdemeanors in the United States, and was thus ineligible for temporary residence pursuant to the regulation at 8 C.F.R. § 245a.2(c).

On appeal, counsel argues that though the applicant was convicted of three or more misdemeanor offenses, there is a discrepancy between the definition of a misdemeanor offense found in 8 C.F.R. § 245a.1(o) and the definition for the same offense in California Penal Code (CPC) §§ 17(b) and 19. He argues that because the CPC definition of a misdemeanor is broader than the definition found in the Code of Federal Regulations (C.F.R.), the applicant's convictions may not necessarily be considered misdemeanors pursuant to 8 C.F.R. § 245a.1(o). He further argues that though the applicant was convicted of a misdemeanor under CPC §§ 484 and 488, because the theft that resulted in this conviction was of products below \$50.00, this conviction should have been an infraction rather than a misdemeanor.

The regulation at 8 C.F.R. § 245a.2(d)(5) states that an applicant applying for adjustment to temporary resident status has the burden of proving 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 under the provisions of section 245a of the Act, and is otherwise eligible for adjustment of status under this section.

The regulation at 8 C.F.R. 245a.2(c)(1) provides that any applicant who has been convicted of a felony or three or more misdemeanors is ineligible to adjust to temporary resident status.

"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).

The record shows that the applicant has been arrested on seven occasions as follows:

1. The applicant was arrested on March 22, 1975 by the Redondo Beach Police Department for *Armed Robbery*, under CPC § 211. CPC § 213 clarifies that a violation of CPC § 211 is a felony offense. This charge against the applicant was dropped because of insufficient evidence on March 25, 1975.
2. The applicant's second arrest was on December 12, 1981 when the Santa Ana Police Department arrested the applicant for *Theft/petty theft*, violations of CPC §§ 484 and 488. Under the California Penal Code, *Theft* is a divisible offense that can result in either a misdemeanor conviction, if courts determine that the offense was for a *Petty Theft*, or a felony conviction if the courts determine that the offense falls under one of the categories found in CPC § 487 as *Grand theft*. CPC § 490 states that *Petty theft* is a misdemeanor offense. The applicant was **convicted** of a violation of CPC § 488 *Petty Theft* and sentenced to five days in jail and 24 months probation. (Case Number [REDACTED]).
3. The applicant's third arrest was on March 30, 1982 by the Santa Ana Police Department for a violation of CPC § 488, *Petty Theft* and for *Criminal contempt*, a misdemeanor. The record shows the applicant was **convicted** of both counts and sentenced to a fine and five days in jail. (Case number [REDACTED]).
4. The applicant was arrested for the fourth time by the United States Border Patrol on June 20, 1982 and charged with one count of *Alien Smuggling*. The record shows that the applicant was not convicted of this offense.
5. The applicant was arrested for the fifth time by the Anaheim Police Department for *Theft/petty theft*, violations of CPC §§ 484 and 488 on October 15, 1984. On October 16, 1986 the Fullerton Municipal Court **convicted** him of a misdemeanor offense and sentenced him to two days in jail and 36 months probation. (Case Number [REDACTED]).
6. The applicant's sixth arrest occurred in Santa Ana for *Theft/petty theft*, a violation of CPC §§ 484 and 488 on November 22, 1985. The applicant was **convicted** of a violation of CPC § 488 *Petty theft* and sentenced to 30 days in jail. (Case Number [REDACTED]).
7. On January 5, 1988 the applicant was arrested for a seventh time by the Los Angeles Police Department for *Disorderly Conduct: Soliciting and Lewd Act*, a misdemeanor and *Fighting, making noise and using offensive words*, a misdemeanor, violations of CPC §§ 647(A) and 415. On January 25, 1988, the Municipal Court of Los Angeles, Hollywood Judicial District dismissed the charge against him in violation of CPC § 647(A) but **convicted** him of the violation of CPC § 415 and sentenced the applicant to 24 months probation and a work program. (Case Number [REDACTED]).

On February 14, 2006, the director of the National Benefits Center noted that the applicant's fingerprints revealed that the applicant had been arrested on March 22, 1975 for *Robbery*; on December 12, 1981 for *Petty theft*; on March 30, 1982 for *Petty theft* and *Contempt*; on June 20, 1982 for *Alien Smuggling*; on October 15, 1984 for *Petty theft*; and on November 22, 1985 for *Petty theft*. The director then stated that Citizenship and Immigration Services (CIS) determined that the applicant had not met his burden of proving that he was eligible for temporary resident status because it appeared that the applicant had been convicted of three or more misdemeanor offenses as a result of these arrests. The director stated that the applicant must submit certified court documents for each case. The director afforded the applicant 30 days within which to submit this and other evidence in support of his application.

The applicant submitted the following documents in response to the NOID:

- The applicant's criminal history. On March 25, 2005, the Department of Justice of the State of California provided the applicant with his criminal history record. This record contained the applicant's arrest and conviction records as previously noted.
- A request to expunge the applicant's January 28, 1988 conviction under CPC § 415, *Disturbing the peace*. It is noted that at the time of this decision the record does not indicate that this conviction has been expunged as a result of this request. Further, it is noted that the record reflects that the court advised the applicant that a conviction for this offense may result in immigration consequences.
- An undated statement in both a typed, six page version and handwritten 20 page version which explains the circumstances surrounding the applicant's 1975 arrest for *Robbery*, his arrest for *Alien smuggling* and his arrests and subsequent convictions for *Petty theft*. Here, he states that the arrest for *Robbery* resulted from him simply being a passenger of a car whose driver was intoxicated and resisted arrest. He notes that the driver of the car was in possession of a weapon at the time of this arrest. He asserts that he was merely offering transportation to an individual who needed a ride and was undocumented at the time he was arrested for *Alien smuggling*. He goes on to state that he was shoplifting for food for himself and his dog multiple times because he could not afford to buy food when he was first arrested for *Petty theft* and that his shoplifting became a compulsion which he has since overcome.

The director denied the application on February 2, 2007. In her decision, the director stated that because the applicant was convicted of three or more misdemeanors, he was ineligible to adjust to temporary resident status pursuant to the regulation at 8 C.F.R. § 245a.2(c).

On appeal, counsel argues that because the definition of a misdemeanor in the CPC is broader than the definition found in the C.F.R., many of the convictions resulting from the applicant's arrests should not be considered misdemeanors.

Counsel is not persuasive. As was previously noted, the C.F.R. defines "Misdemeanor" as 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).

In this case, the applicant has been convicted of four counts of violations of CPC § 488, *Petty theft*. The CPC § 486 states that *Theft* is a divisible offense which is divided into two degrees, the first of which is termed *Grand theft*; the second, *Petty theft*. CPC § 487 defines categories of *Grand Theft* and CPC § 488 states that, "Theft in other cases is *Petty theft*" and CPC § 490 states that *Petty theft* is punishable by fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or both. This indicates that convictions of *Petty theft* offenses are punishable as misdemeanors.

As counsel argues, CPC § 490.1 does state that *Petty theft*, where the value of the money, labor, real or personal property taken is of a value which does not exceed fifty dollars (\$50), may be charged as a misdemeanor or an infraction, at the discretion of the prosecutor, provided that the person charged with the offense has no other theft or theft-related conviction. However, in this case the applicant has been charged with four theft-related convictions. Therefore, the prosecutor would not have had the ability to exercise this discretion for three of the applicant's four *Petty theft* convictions. Further, though the applicant served less than five days in a detention facility for two of his misdemeanor convictions, the offenses for which he was convicted were punishable as misdemeanors with a maximum term of more than five days.

The applicant was convicted of five misdemeanors committed in the United States. Although the counsel argues that the CPC definition of a misdemeanor is not consistent with the definition of a misdemeanor found in the C.F.R., the fact still remains that the applicant has been convicted of three or more crimes committed in the United States that are punishable as misdemeanors. Therefore, the applicant remains ineligible for temporary residence.

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