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U.S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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[Redacted]

FILE: [Redacted] Office: LOS ANGELES Date: **AUG 06 2009**
MSC 05 342 13205

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 if your case was remanded for further action, you will be contacted.

John F. Grissom
Acting 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 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 (together comprising the I-687 Application). The director denied the application for temporary residence because of inconsistencies between the applicant's testimony and application regarding his absences from the United States during the qualifying period. The director also denied by the application because the record indicated that the applicant had three misdemeanor convictions in California. The director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

The applicant is represented by counsel on appeal. Counsel argues that the applicant's affidavits verify that he entered the United States unlawfully and remained in an unlawful status for the requisite period. Counsel also maintains that the applicant has only one misdemeanor conviction. Counsel avers that the applicant remains eligible for temporary residence pursuant to the terms of the settlement agreements.

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).

For purposes of qualifying for certain immigration benefits, 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 Lawful Permanent Resident status. 8 C.F.R. § 245a.18(a)(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).

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to meet his burden of establishing continuous unlawful residence in the United States for the duration of the requisite period, that he has no disqualifying criminal convictions and is thus otherwise admissible to the United States. Here, the applicant has failed to meet this burden.

The AAO has reviewed all of the documents and evidence in the file in their entirety, including the court documents, criminal history records, and the statutes under which the applicant was convicted. The record before the AAO contains a letter from the California Department of Justice; Bureau of Criminal Identification, dated July 19, 2004, as well as a photocopy of a criminal docket sheet from the Superior Court of California, San Bernardino County, and a petition to the same trial court dated February 3, 2006. Viewed together, these documents list a series of criminal arrests and convictions:

1. A conviction on or about November 15, 1994 for violating section 273.5(A) of the California Penal Code – *Inflict Corporal Injury on Spouse*. [REDACTED]

[REDACTED] The applicant was sentenced to serve 30 days in jail, and 24 months probation. The court also ordered the applicant to attend Narcotics Anonymous meetings three times a week for 16 weeks, to attend a Batterers Treatment Program for one year, and to have no further contact with the victim. The criminal history record charges this offense as a misdemeanor violation, but our review of the criminal statute in question reveals that it is listed as a felony, with a maximum penalty of up to four years in prison and/or a maximum fine up to \$6,000. Thereafter, on February 3, 2006, this conviction was dismissed pursuant to California’s rehabilitation statute: section 1203.4 of the California Penal Code.

2. An arrest on or about October 26, 1995, for two counts of violating section 242 of the California Penal Code – *Battery*. [REDACTED]

[REDACTED] The record indicates that the criminal proceedings were suspended and the charges were subject to the diversion provisions of the California Penal Code for a period of 12 months. Because the proceedings were suspended prior to the entry of judgment and the applicant successfully complied with the requirements of the diversion program, the AAO does not consider this arrest a criminal conviction as defined under section 101(a)(48) of the Immigration and Nationality Act.

3. An arrest on or about November 24, 1996 for one count of violating section 11350(a) of the California Health and Safety Code – *felony possession of a narcotic controlled substance*. [REDACTED]

[REDACTED] The record indicates that this charge was also subject to the diversion provisions of the California Penal Code and that the charges were later dismissed. The AAO also notes that as regards this particular arrest, the criminal docket sheet listed above contains notations that reveal that the court ordered that probation be reinstated on December 6, 1996, and continued until December 6, 1998, an additional two years, and that the applicant was ordered to serve 60 days in jail. Unlike the battery charges mentioned above, the applicant was actually sentenced to a term of incarceration and a 24 month term of probation. Therefore, the AAO concludes from these documents that the applicant’s arrest for possession of a narcotic controlled substance is a valid conviction for immigration purposes, and that the subsequent dismissal of the charges occurred after a 60 day period of incarceration and a successful completion of two years of probation, and not on account of a fundamental constitutional error in the underlying trial court proceedings. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

From all of the records cited above, the AAO concludes that the applicant has two misdemeanor convictions which may affect his immigration status: the spousal abuse conviction of 1994 and the controlled substance conviction of 1996.²

On appeal, counsel argues that the spousal abuse conviction is a misdemeanor and that the battery charges were diverted. Counsel does not address the controlled substance conviction. Consequently, counsel maintains that neither offense carries immigration consequences. As noted above, the diverted criminal charges are not considered convictions, but the spousal abuse charge, although a misdemeanor is a conviction for a crime involving moral turpitude. The applicant is not eligible for temporary resident status on this ground, as well as on account of other grounds listed by the director and discussed *infra*.

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.

The AAO has reviewed the court documents surrounding the applicant’s conviction under section 273.5(A) of the California Penal Code. In addition to a jail sentence and 24 months probation, the court ordered the applicant to attend a domestic violence counseling program and to have no further contact with the victim for one year. Finally, the court documents and criminal records identify the applicant’s violation of section 273.5(A) as one of spousal abuse.

² The AAO finds no reference to the motor vehicle violations in 1987 and listed in the director’s decision. Consequently, we do not consider them on appeal.

Therefore, because the applicant was convicted under the spousal abuse section of section 273.5(A) of the California Penal Code, he stands convicted of a CIMT for which the “petty offense” is not available because the applicant stands convicted of more than one crime and the maximum possible sentence exceeds one year. 8 U.S.C. § 1182(a)(2)(A)(ii); section 212(a)(2)(A)(ii) of the Immigration and Nationality Act. The ultimate dismissal of the conviction pursuant to section 1203.4 of the California Penal Code is ineffective for immigration purposes because it is settled law in the Ninth Circuit that a conviction remains valid despite post-conviction expungements on account of successful completion of the terms of probation or rehabilitation.³ He is therefore ineligible for temporary resident status pursuant to 8 U.S.C. §1255a(4)(B); 8 C.F.R. § 245A.4(B). No waiver of such ineligibility is available.

The director also denied the application for temporary residence because the applicant had not met his burden of proof regarding entry and continuous residence for the requisite period. The AAO has reviewed the evidence submitted on this issue and the arguments offered in the brief on appeal. We agree with the director’s conclusions. The applicant states that he entered the United States lawfully with a student visa in 1980 and never enrolled in school. As the applicant has not submitted any documentary evidence of entering the United States on a student visa in 1980, he has not met his burden of proof regarding his initial entry.

The applicant also submitted affidavits to support his attestations of entry and residence. We have examined the affidavits and accompanying documents from [REDACTED], [REDACTED], and [REDACTED]. The affidavits all contain statements that the affiants have known the applicant for several years and that they attest to the applicant being physically present in the United States during the required period. These affidavits fail, however, to establish the applicant’s entry into the United States prior to January 1, 1982 and continuous unlawful residence in the United States for the duration of the requisite period. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality; an applicant must provide evidence of eligibility apart from his or her own testimony; and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility.

³ 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 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. 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).

None of the witness statements provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship; have knowledge of the facts alleged. Upon review, the AAO finds that, individually and together, the witness statements do not indicate that their assertions are probably true. Therefore, they have little probative value.

For these additional reasons, the applicant is not eligible for temporary resident status. The decision of the director is affirmed.

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