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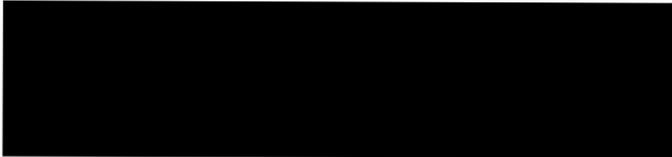
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: [REDACTED] Office: LOS ANGELES Date: JUL 09 2009
MSC 06 101 23515

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:

SELF-REPRESENTED

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 the applicant had been convicted of more than three misdemeanor offenses 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, who represents himself on appeal, does not challenge the director's conclusions regarding his criminal convictions. The applicant states that three of the five convictions have been expunged. The applicant asserts that he remains eligible for temporary resident status.

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).

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 because of his multiple misdemeanor convictions.

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 temporary resident status. 8 C.F.R. § 245a.2(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).

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).

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. State rehabilitative actions that

do not vacate a conviction as a result of underlying procedural or constitutional defects in the merits of the case are of no effect in determining whether an alien is considered convicted for immigration purposes.

A dismissal for anything other than on constitutional grounds would have no effect on the applicant's immigration status. As this case arises within the jurisdiction of the Ninth Circuit Court of Appeals, the law of that circuit is applicable. 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

The AAO has reviewed all of the documents and evidence in the file in their entirety. Court documents and federal criminal background reports indicate that the applicant has five criminal misdemeanor convictions, including:

- 1) A conviction on or about March 23, 1995 for violating section 484(A) of the California Penal Code – *Petty Theft*. The applicant was sentenced to 30 days in jail and 36 months probation. [REDACTED] This offense is charged as a misdemeanor in the court documents.
- 2) A conviction on or about May 19, 1998 for violating section 460(B) of the California Penal Code – *Burglary (2nd degree)*. [REDACTED]. The applicant was sentenced to 45 days in jail and 36 months probation. This offense is charged as a misdemeanor in the court documents. This conviction was ultimately dismissed on April 14, 2005 pursuant to section 1203.4 of the California Penal Code.
- 3) A conviction on or about May 23, 2000 for violating section 487(A) of the California Penal Code – *Grand Theft*. [REDACTED] The applicant was sentenced to 10 days in jail and 36 months probation. This offense is also listed as a misdemeanor. This conviction was ultimately dismissed on December 5, 2003 pursuant to section 1203.4 of the California Penal Code.
- 4) A conviction on or about August 18, 2000 for violating section 23152(B) of the California Vehicle Code – *Driving Under the Influence of Alcohol*. [REDACTED]. The applicant was sentenced to a fine, restitution, and ordered to serve 36 months probation. This offense is also listed as a misdemeanor. This conviction

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).

was ultimately dismissed on January 4, 2005 pursuant to section 1203.4 of the California Penal Code.

- 5) A conviction on or about May 5, 2006 for violating section 23152(B) of the California Vehicle Code – *Driving Under the Influence of Alcohol*. [REDACTED] The applicant was sentenced to a perform three days of community service, to pay a fine, and ordered to serve 36 months probation. This offense is also listed as a misdemeanor.

The record before the AAO clearly establishes that the applicant has five misdemeanor convictions, of which three have been dismissed subsequent to the successful completion of court ordered probation. The AAO has reviewed the statutes under which the applicant was convicted as well as the section of the California Criminal Code under which three of the convictions were later vacated. 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 trial court proceedings.

In this case, there is no evidence in the record to suggest that the applicant's petitions to dismiss his convictions were granted on account of an underlying procedural defect in the merits of the criminal proceedings, and the judgments remain valid for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

Additionally, the AAO notes that three of the five criminal convictions are for some degree of theft. In and of itself, a conviction for theft is considered a conviction for a crime involving moral turpitude for which no waiver of inadmissibility exists.³

The applicant stands convicted of five misdemeanor offenses. 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 decision of the director is **affirmed**.

³ *See USA v. Esparza-Ponce*, 193 F.3d 1133, 1137-38 (9th Cir. 1999) (...theft is a crime of moral turpitude) (citations omitted). The Court in *Esparza-Ponce* also reasoned that as the elements of petty theft are the same as theft in general, the "element of moral turpitude would continue to be present whether the theft be petty or grand." *Id.*, at 1138. The Court's line of reasoning regarding theft convictions continued in *Flores Juarez v. Mukasey*, 530 F.3d 1020 (9th Cir. 2008). Citing the rationale in *USA v. Esparza-Ponce*, the *Juarez v. Mukasey* Court held that a conviction under California Penal Code § 484 for theft is a crime involving moral turpitude under 8 U.S.C. §1182(a)(A)(i)(I), thus rendering the applicant ineligible for cancellation of removal, *see also Tall v. Mukasey*, 517 F.3d 1115, 1119 (9th Cir. 2008) (an offense that has an element of intent to defraud or is inherently fraudulent by nature categorically qualifies as a crime involving moral turpitude).

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