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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**

41

FILE:

MSC 06 095 14383

Office: LOS ANGELES

Date:

JUN 26 2009

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. 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 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 is represented by counsel on appeal. Counsel argues that one of the applicant's convictions was vacated because of a procedural defect in the underlying proceedings. Counsel maintains that the remaining two misdemeanor convictions do not render the applicant ineligible 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 two misdemeanor convictions for crimes involving moral turpitude (CIMT).

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 AAO has reviewed all of the documents and evidence in the file in their entirety, as well as the statutes under which the applicant was convicted. Court documents and criminal investigation records indicate that the applicant has three criminal misdemeanor convictions, including:

- 1) A conviction on or about May 13, 1991 for violating section 484 of the California Penal Code – *Petty Theft*. The applicant was sentenced to two days in jail and 24 months probation. [REDACTED]. This offense is charged as a misdemeanor in the court documents. Thereafter, on March 12, 2007, the trial court granted the applicant's motion to vacate the sentence and dismiss the charges, pursuant to section 1016.5 of the California Penal Code.

- 2) A conviction on or about November 9, 2000 for violating section 273.5(A) of the California Penal Code – *Inflict Corporal Injury on Spouse* and for violating section 422 of the California Penal Code – *Making a Criminal Threat*. [REDACTED] The court issued a three year restraining order, and sentenced the applicant to serve 90 days in jail and three years probation. The court also ordered the applicant to complete a one year domestic violence counseling program and attend 20 parenting classes. The court documents charge these offenses as misdemeanor violations.

In total, the record establishes that the applicant has three misdemeanor criminal convictions in 1991 and 2000 in the state of California. However, the applicant's May 13, 1991 petty theft conviction was vacated on March 12, 2007 pursuant to section 1016.5 of the California Penal Code. This amendment to the California Penal Code, effective in 1978, mandates that a non-citizen resident of the United States must be informed of the potential immigration consequences of entering a plea of guilty or *nolo contendere* in criminal proceedings. The court documents issued in the applicant's criminal proceedings in 1991 reveal that the applicant was not so informed, thus, his conviction was vacated on substantive grounds in 2007 and cannot be considered in immigration proceedings. *See Nath v. Gonzales*, 467 F.3d 1185, 1187-89 (9th Cir. 2006); *see also Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107-08 (9th Cir. 2006); *Lujan-Armendariz v. INS*, 222 F.3d 728, 746-47 (9th Cir. 2000).

What remains are the applicant's two misdemeanor convictions for violating sections 273.5(A) of the California Penal Code – *Inflict Corporal Injury on Spouse* and 422 of the California Penal Code – *Making a Criminal Threat*. The applicant does not argue that these convictions cannot be considered in immigration proceedings and the AAO will now examine their impact in that regard.

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. We note that the court issued a restraining order against the applicant on November 7, 2000 effective for a period of three years and ordered the applicant to attend a domestic violence counseling program for one year, including 20 parenting classes. The applicant was also ordered to pay a fine into a domestic violence fund. Finally, the court documents identify the applicant's violation of section 273.5(A) as one of spousal abuse. Therefore, because the applicant was convicted under the spousal abuse section of 273.5(A) of the California Penal Code, he stands convicted of a CIMT.

What remains for analysis and review is the applicant's conviction under section 422 of the California Penal Code – *Making a Criminal Threat*. The AAO has reviewed the pertinent statute and has researched the controlling precedent of the Ninth Circuit. The statute under which the applicant was convicted prohibits the issuance of threats to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, and to such an extent that a reasonable person would be placed in immediate, unconditional and sustained fear for their safety or the safety of their family. A conviction under this statute carries a punishment of imprisonment in the county jail not to exceed one year, or imprisonment in the state prison.

Neither the Ninth Circuit Court of Appeals, nor the Board of Immigration Appeals (BIA) has yet ruled that a conviction under section 422 of the California Penal Code is categorically a CIMT. However, the AAO notes that the applicant's conviction in this case involves the second count of a three count criminal indictment. As noted above, the first count resulted in a plea of guilty to spousal abuse, and the second count, the charge of making criminal threats, resulted in a guilty plea and the issuance of a three year restraining order, in addition to a court ordered enrollment in counseling for domestic violence, parenting classes, and a financial contribution to a domestic violence fund. Therefore, the AAO concludes that, pursuant to the modified categorical approach analysis outlined by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) a conviction in this case under section 422 of the California Penal Code for making criminal threats is a conviction for a CIMT .

The applicant has two misdemeanor convictions for crimes involving moral turpitude. 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 applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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