

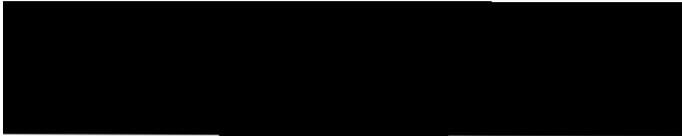


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MAY 14 2009

FILE:

MSC 06 098 16675

Office: LOS ANGELES

Date:

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 two crimes involving moral turpitude (CIMT) in the United States. The director, therefore, 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 does not dispute the existence of two separate convictions for theft. Counsel maintains that the convictions do not constitute crimes involving moral turpitude. Thus counsel argues that the applicant 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).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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, "[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 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 or petition.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to meet her burden of establishing continuous unlawful residence in the United States for the duration of the requisite period, and that she is otherwise admissible to the United States. Here, the applicant cannot establish that she is otherwise admissible to the United States because of her two convictions for theft; thus, she has failed to meet the burden of demonstrating admissibility.

The record before the AAO reveals that the applicant has two California state misdemeanor convictions. 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).

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.¹ See 8 U.S.C. § 1182(a)(2)(A)(ii).

The record contains court documents that reflect the applicant has two convictions for misdemeanor offenses in the county of Los Angeles, California:

- A July 26, 2004 conviction for a violation of section 484(A) of the California Penal Code, *Theft of Property* (████████████████████). The applicant was sentenced to 8 days in jail, 24 months probation and ordered to pay a fine.
- A November 16, 2006 conviction for a violation of section 666-484(A) of the California Penal Code, *Petty Theft with Priors* (████████████████████). The applicant was sentenced to serve 15 days in jail, 36 months probation and ordered to pay a fine.

The AAO observes that the final determination in this case rests upon an analysis of the applicant's 2004 and 2006 convictions for theft of personal property, in violation of §484(A) of the California Penal Code. If the theft convictions are considered to be CIMTs, then the applicant is statutorily ineligible for temporary residence status.

The AAO has reviewed the statutory provisions and the relevant case law of the Ninth Circuit Court of Appeals (CA9), the jurisdiction in which this case arises. The AAO concludes that a conviction under §484(A) of the California Penal Code, theft of personal property, is a CIMT.

¹ 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).

Furthermore, as the petty offense exception does not apply in this particular case because the applicant has not one but two convictions, we determine that the applicant is ineligible for admissibility to the United States, and thus, equally ineligible for temporary resident status.

We find support for this conclusion in the extant case law of the Ninth Circuit Court of Appeals. *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 *Mukasey* Court held that a conviction under California Penal Code § 484 for theft, the statute in question here, 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). In the matter presently before the AAO, the applicant has two criminal convictions for crimes involving moral turpitude (CIMT). The applicant was convicted in 2004 for theft of property and in 2006 for petty theft with priors, in violation of §§ 484(A) and 666-484(A) of the California Penal Code. The petty offense exception does not apply because she has not one, but two convictions for theft.

Counsel argues that the applicant’s July 24, 2004 conviction is not a misdemeanor because the applicant “was given a suspended sentence of less than five days.” This argument is without merit. Initially, the AAO notes that the conviction records reveal that the applicant was sentenced to 8 days in the Los Angeles County jail, the imposition of the remainder of the sentence was suspended, and the applicant was ordered to serve two years of probation. A violation of section 484(A) of the California Penal Code exposes the applicant to a maximum possible sentence of one year or less and thus meets the federal definition of “misdemeanor” discussed *supra*. It is irrelevant for immigration purposes that the applicant was actually sentenced to something less than one year in jail. 8 C.F.R. § 245a.1(p).

We therefore conclude that the applicant is ineligible for temporary resident status pursuant to the terms of the settlement agreements, as she cannot establish that she is otherwise admissible to the United States. Congress has provided no waiver for a CIMT as a ground of inadmissibility.

The applicant has two misdemeanor convictions for crimes involving moral turpitude. She 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.