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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 04 339 10159

Office: LOS ANGELES

Date: **MAR 11 2010**

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.

Elizabeth McCormack

Perry Rhew
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, finding that two of the applicant's three misdemeanor offenses resulted in convictions for crimes involving mortal turpitude (CIMT). 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 asserts that one of CIMT convictions was expunged pursuant to section 1203.4 of the California Penal Code, and that the remaining conviction for a CIMT is amenable to the petty offense exception. Therefore, counsel maintains 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 Immigration and Nationality Act (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.

Additionally, 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).

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. The applicant has failed to meet this burden of proof because the record establishes that the applicant has three misdemeanor convictions, two for petty theft, and one for contributing to the delinquency of a minor, and that all three convictions remain valid for immigration purposes.

Court documents reveal that on December 4, 1989, the applicant was convicted for one count of violating section 484 of the California Penal Code – petty theft. [REDACTED] The applicant was sentenced to ten days in jail and 36 months probation. This offense is listed as a misdemeanor.

On June 5, 1996, the applicant was convicted for one count of violating section 666 of the California Penal Code – petty theft with priors, and for one count of violating section 272 of the California Penal Code – contributing to the delinquency of a minor. [REDACTED] Both offenses are listed as misdemeanors.

On May 18, 2007, the court granted the applicant's petition to dismiss the 1989 theft conviction pursuant to section 1203.4 of the California Penal Code. The AAO notes that the applicant did not reveal any of the three criminal arrests and convictions on her Form I-687.

The AAO will first address the effect of the dismissal of the theft conviction under section 1203.4 of the California Penal Code. Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 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. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, *id.*

Section 1203.4 of the California Penal Code is a rehabilitative statute, in that it serves to expunge a criminal conviction subsequent to the successful completion of some form of probation or rehabilitation. It does not serve to vacate a conviction on constitutional grounds. In this case, there is no evidence in the record to suggest that the applicant's convictions were overturned on account of an underlying procedural or constitutional defect in the merits of the case. *See Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). Therefore, both theft convictions remain valid convictions for immigration purposes.

Next, the AAO will examine whether the theft convictions are for crimes involving moral turpitude and whether the petty offense exception may apply to ameliorate their immigration consequences. As this case arises with the jurisdiction of the Ninth Circuit Court of Appeals, the law of that circuit is controlling as regards the definition of a CIMT. The Ninth Circuit has conclusively ruled that a crime involving theft is a CIMT. *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 *Flores Juarez* 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 this case, the applicant has three misdemeanor convictions, two of which are convictions for a CIMT. A conviction for a CIMT disqualifies an applicant for temporary residence unless the applicant has committed only one crime and the conviction for a CIMT meets the petty offense exception.² *See* 8 U.S.C. § 1182(a)(2)(A)(ii). Because the applicant has two criminal convictions, the petty offense exception is not applicable here.

The applicant has three disqualifying misdemeanor convictions, including two convictions for a CIMT. She is therefore ineligible for temporary resident status pursuant to section 245A(4)(B) of the Act, 8 U.S.C. §1255a(4)(B); 8 C.F.R. § 245A.4(B). No waiver of such ineligibility is available.

² 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).

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