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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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DATE: NOV 30 2011

Office: NATIONAL BENEFITS CENTER

FILE: [redacted]

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 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, National Benefits Center. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record indicates that the applicant filed a Form I-687 Application for Temporary Resident Status on October 17, 2005. On September 14, 2006, the director denied the application noting that the applicant failed to appear for a fingerprinting appointment. Thus, the director indicated that the application was abandoned.

On September 22, 2010, U.S. Citizenship and Immigration Services (USCIS) informed the applicant that, pursuant to a recent court order, applications for temporary resident status may not be denied based on abandonment.[1] The applicant was informed that he was entitled to file an appeal with the AAO which must be adjudicated on the merits.

On appeal, the applicant states that he did not know about the original appointment until 6 months later and that he appeared for a rescheduled fingerprinting appointment.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Following *de novo* review, the AAO found that that the director's basis for denial of the Form I-687 was in error. However, the AAO identified alternative grounds for denial of the application. Specifically, the AAO noted that the applicant failed to submit sufficient evidence in support of his application.

On May 16, 2011, the AAO issued a notice of intent to deny (NOID) informing the applicant of the deficiencies in the record and providing him with an opportunity to respond. On May 31, 2011, the AAO received the applicant's response to the AAO's NOID. In response to the AAO's NOID, the applicant submits a statement, a disposition, and a criminal record search.[2]

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

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[1] On December 14, 2009, the United States District Court for the Eastern District of California ruled that United States Citizenship and Immigration Services (USCIS) may not apply its abandonment regulation, 8 C.F.R. § 103.2(b)(13), in adjudicating legalization applications filed by CSS class members. *See, CSS v. Michael Chertoff,* Case 2:86-cv-01343-LKK-JFM.

[2] In the AAO's NOID, this office requested information from the applicant about a deportation on May 22, 2003 and an arrest for possession of a controlled substance. These questions do not relate to the applicant and the misfiled documentation has been removed from the applicant's record of proceeding.

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 245(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). To meet his or her burden of proof, 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. 8 C.F.R. § 245a.2(d)(6).

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).

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, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* at 80. 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 petitioner 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 or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (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 (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time.

On the Form I-687, the applicant stated that his date of birth is June 6, 1980. On the Form I-694 filed on October 7, 2010, the applicant stated that he is 30 years old and has been in the United States for 20 years. Based upon the applicant's statement on appeal, he first entered the United States in 1990. Therefore, the applicant was not physically present in the United States during the requisite period and is statutorily ineligible for temporary resident status. The applicant does not submit other evidence of his entrance into the United States other than his statements in the record.

In his response to the NOID, the applicant states that he was removed by immigration authorities in 2004 and was not fingerprinted at the time. As the record does not contain any documentation relating to this removal, the AAO will not further discuss the issue.[3]

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for 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).

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act).

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. De George*, 341 U.S. 223, *reh'g denied*, 341 U.S. 956 (1951).

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[3] The record previously suggested that removal proceedings were initiated against the applicant and that the applicant was deported in 2003. This information related to another person and the misfiled documentation has since been removed from the applicant's file.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 Title 21). Section 212(a)(2)(A)(i)(II) of the Act.

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. *See* 8 U.S.C. § 1182(a)(2)(A)(ii). 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). For the purpose of the petty offense exception, "'the maximum penalty possible' . . . refers to the statutory maximum sentence, not the guideline sentence to which the alien is exposed." *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 835 (9th Cir. 2008) (offense of bribery of a public official did not qualify for petty offense exception where statutory maximum for offense was 15 years).[4]

The record of proceeding contains evidence that the applicant was arrested and convicted of – *Theft Petty Theft Merchandise*, in the Superior Court Vista, California (case no.

In response to the AAO's NOID, the applicant submitted a disposition for arrest for *Petty Theft of Merchandise*. The disposition states that the applicant served four days in the custody of the sheriff and was fined $750. The applicant also submitted the May 25, 2011 results of a criminal and traffic/minor offense record search from the Superior Court of California, San Diego, signed by the clerk of the Superior Court. The record submitted lists only the arrest for *Petty Theft of Merchandise*.

Further, the AAO finds that the applicant's conviction for petty theft is a conviction for a crime involving moral turpitude (CIMT). In general, crimes involving fraud, deceit, and theft are considered to be crimes involving moral turpitude. *See, e.g., Rashtabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir. 1994) (California conviction for grand theft is a CIMT); *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980) (per curiam) (conspiracy to affect the market price of stock by deceit with intent to defraud is a CIMT); *Winestock v. INS*, 576 F.2d 234, 235 (9th Cir. 1978) (dealing in counterfeit obligations is a CIMT); *see also United States v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir.

[4]Additionally, an applicant for admissibility who stands convicted of a CIMT may be eligible for the youthful offender exception if: the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States. 8 U.S.C. § 1182(a)(2)(A)(ii)(I). The applicant does not assert that he is eligible for the youthful offender exception and we note that the crime was not committed when the applicant was under 18 years of age.

1999) (stating in illegal reentry case that petty theft constitutes a CIMT); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-20 (9th Cir. 2005) (burglary convictions under Wash. Rev. Code §§ 9A.52.025(1) and 9A.08.020(3) do not categorically meet the definition of CIMT, but do meet the definition under the modified categorical approach because petitioner intended to steal property, a fraud crime); *see also Flores Juarez v. Mukasey*, 530 F.3d 1020, 1022 (9th Cir. 2008) (per curiam) ("Petty theft is a crime involving moral turpitude under 8 U.S.C. § 1229b(b)(1)(B).")

Moreover, as noted *supra*, an applicant who has been convicted of a CIMT is inadmissible, and therefore ineligible for temporary resident status. However, an alien with one CIMT is not inadmissible if he or she meets the petty offense exception, which requires that the maximum penalty possible for the crime of which the alien was convicted did not exceed imprisonment for one year, and that the alien was not sentenced to a term of imprisonment in excess of 6 months. 8 U.S.C. § 1182(a)(2)(A)(ii). The AAO finds that the applicant's misdemeanor conviction qualifies for the petty offense exception, since the maximum possible penalty for a misdemeanor in California is six months. *See* California Penal Code, Section 19. In addition, the applicant was not sentenced to a term of imprisonment in excess of six months, but served four days in the custody of the sheriff. Therefore, the applicant's misdemeanor conviction does not constitute an additional basis for denial of this application.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he entered the United States before January 1, 1982, and that he continuously resided in the United States in an unlawful status since such date and through May 4, 1988.

As noted above, the applicant stated in the Form I-694 signed on October 4, 2010, that he has been in the United States for 20 years or since 1990. This statement is inconsistent with the information in his Form I-687. The applicant has not submitted any evidence other than his statements and the Form I-687.

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *See Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--, supra.* 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.