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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 19 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE:

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

FILE:

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Nebraska Service Center Director (director) denied the Application for Temporary Resident Status (Form I-687). In a separate action, the director certified its decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application will be denied.

On May 4, 1988, the applicant filed a Form I-687, Application for Temporary Resident Status, pursuant to Section 245A of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1225a. The director denied the application, finding that the applicant's May 10, 1983 departure pursuant to an order of deportation meant he failed to maintain the required continuous residence. *See* Section 245A(g)(2)(b)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(b)(i).[1]

On April 09, 2013, the director granted the applicant's motion and reopened the Form I-690, Application for Waiver of Grounds of Inadmissibility, and the Form I-687 application.

This matter has a complex procedural history. In *Proyecto San Pablo v. INS*, No. CIV 89-456-TUC-WDB (D. Ariz. Feb. 2, 2001), the U.S. District Court for the District of Arizona held that the legacy Immigration and Nationalization Service (legacy INS) violated the due process rights of a class of applicants for legalization under the Immigration Reform and Control Act of 1986 (IRCA) when it denied those applicants access to their complete deportation or exclusion files and prevented them from seeking waivers to "cure" prior deportations or exclusions. On March 27, 2001, the court ordered the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) to reopen legalization applications filed by class members and (1) accept waiver applications submitted by class members and adjudicate them in the same manner as waiver applications filed by other legalization applicants were adjudicated; and (2) prior to making a decision on a reopened legalization application, provide the applicant with complete copies of prior deportation files, including copies of tapes and/or transcripts of the hearings before the immigration court, to enable the applicant to bring a collateral challenge to the deportation order, if appropriate. Subsequently, in *Proyecto San Pablo v. Dept of Homeland Security*, No. CV 89-456-TUC-RCC (D. Ariz. June 4, 2007), the court reiterated its March 27, 2001 holding and ruled that, if the entire record cannot be located by the defendants, the following burden of proof will apply:

> A legalization applicant who may be denied on the basis of 8 U.S.C. 1225a(g)(2)(B)(i), or because of a prior deportation or exclusion order, must make a *prima facie* showing that the prior deportation or exclusion order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or was otherwise unlawful or involved a gross miscarriage of justice. If the applicant makes such a showing, then CIS has the burden of coming forward with a copy of the tape and/or transcript of the prior deportation or exclusion hearing . . . If

[1] The section provides that "an alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside the United States as a result of a departure under an order of deportation."

> CIS does not produce such evidence from the prior deportation or exclusion file, then the prior deportation or exclusion cannot be used as evidence to support a denial of legalization benefits.

Neither counsel nor the applicant responded to the certified denial. However, we note that counsel for the applicant previously stated that although she has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, the Executive Office for Immigration Review (EOIR) and USCIS have failed to provide the applicant with a complete copy of files relating to his deportation proceeding, including the tape recording and/or transcript of the deportation hearing. The record reflects that on July 27, 2004, USCIS fulfilled the applicant's FOIA request, and released to the applicant a copy of his immigration file. However, the record reflects that on May 12, 2004, the EOIR informed the applicant that after a considerable search of its files, no records were located related to the applicant's deportation proceeding. From the documentary evidence in the record, it does not appear that that the applicant ever received a tape recording and/or transcript of the proceeding. The applicant's physical file (currently in the possession of the AAO) does not contain a tape recording or hearing transcript. As a result, USCIS has complied with the District Court's order to the extent that it has provided the applicant with a copy of his legalization file as it currently exists. As a result of the missing tape and/or transcript, however, the applicant's complete file is unavailable.

To invoke a shift in the burden of proof from the applicant to USCIS, the applicant must make a *prima facie* showing that his deportation order was either: the result of proceedings not in compliance with the governing law or regulations; or occurred in violation of due process; or was otherwise unlawful or involved a gross miscarriage of justice.

In this case, the director granted the applicant's Motion to Reopen and approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds. However, on April 09, 2013, the director denied the applicant's Form I-687, Application for Temporary Resident Status, finding that the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act due to his May 10, 1983 departure pursuant to an order of deportation. The director, therefore, denied the application and certified the matter to the AAO for a ruling. The AAO notes that in rendering a decision, the director did not address whether the proceedings which resulted in the applicant's deportation were conducted in compliance with the governing statute and regulations.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on this matter.

The standard for establishing a *prima facie* case means the evidence reveals a reasonable likelihood that requirements have been satisfied. *See Fernandez v. Gonzales*, 439 F.3d 592, n.6 (9th Cir. 2006) (*citing Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir.2003) (citations omitted)). A

reasonable likelihood means showing a realistic chance that the petitioner can establish the issue in question at a later time. *Guo v. Ashcroft*, 386 F.3d 556, 564 (3rd Cir. 2004) (discussing the *prima facie* standard in the context of motions to reopen).

In applying these standards, the Board of Immigration Appeals (Board) and most Circuits employ a balancing test and weigh all evidence for and against in determining whether a *prima facie* case has been made. *See Zheng v. Mukasey*, 546 F.3d 70, 72 (1st Cir. 2008) (discussing the issue in the context of a motion to reopen); *Wang v. BIA*, 437 F.3d 270, 276 (2d Cir. 2006) (same); *Matter of J-W-S-*, 24 I&N Dec. 185, 191-92; *Matter of C-C*, 23 I&N Dec. 899, 902-03 (BIA 2006) (same); *Guo v. Ashcroft*, 386 F.3d 556, 564-66 (3d Cir. 2004) (same).

In relevant part, under the terms of the *Proyecto* 2007 amended order, the USCIS is required to provide the applicant with a complete copy of his deportation file, including the tape recording and or transcript of his deportation hearing. The relevant regulation in existence at the time of the applicant's deportation hearings, 8 C.F.R. § 242.15, indicated that "[t]he hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer." Counsel has repeatedly requested a copy of the tape recording and/or transcript of the applicant's deportation hearings. It is likely that the hearing was recorded, and possible that it was included among other hearings on one tape (as we understand was frequently the case); however, EOIR and USCIS searches have not produced a copy of the recording. The current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. Further, the EOIR Associate General Counsel informed the applicant that it could not locate any records related to the applicant's deportation proceeding. Therefore, it appears that USCIS and EOIR have fully complied with the court's order to provide the applicant with all available records relating to his deportation proceeding. While the applicant does not appear to be statutorily eligible for legalization without the special rules of construction set out by the court in the *Proyecto* amended order, and the outstanding deportation order appears valid under current ninth circuit case law (and has apparently never been challenged to EOIR or to the Court of Appeals), we are obliged to follow, to the letter, the 2007 amended *Proyecto* order.

We therefore find the evidence sufficient to determine that the applicant has made a *prima facie* showing that the proceedings which resulted in his deportation were not in compliance with the governing regulations as there is no evidence that the applicant's deportation hearings were recorded. As a result, USCIS cannot use the prior deportation order as evidence to support a denial of legalization benefits. Consequently, pursuant to the terms of the 2007 amended *Proyecto* order, the AAO is constrained to find that the applicant has overcome the particular basis of the denial cited by the director.

An applicant for temporary residence 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 245(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). An alien shall not be considered to have resided continuously in the United States if, during any period

for which continuous residence is required, the alien was outside the United States under an order of deportation. Section 245A(g)(2)(B)(i), 8 U.S.C. § 1255a(g)(2)(B)(i).

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 periods, 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 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).

Furthermore, it is noted that an applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255a(a)(4)(B). The regulations provide relevant definitions at 8 C.F.R. § 245a.

"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 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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

Here, a review of the record reveals that the applicant has several arrests and criminal convictions. On October 10, 2013, the AAO issued a Notice of Intent to Deny (NOID) the Form I-687 application, informing the applicant of deficiencies in the record and providing him with an opportunity to respond. Specifically, the AAO requested the applicant provide full criminal dispositions regarding the following matters, among others:

- The record contains an FBI rap sheet which shows that on March 1, 1993, the applicant was arrested in California for the offense of disobeying a court order in violation of section 166.4 of the California Penal Code. The final disposition of this arrest is not known.

- On May 13, 1993, the applicant was arrested in California for "obstructing and/or resisting a public officer" in violation of section 148 of the California Penal Code and for disobeying a court order in violation section 166.4 of the California Penal Code. On July 30, 1993, the applicant was convicted of misdemeanor "obstructing and/or resisting a public officer." For this offense, the applicant was sentenced to 20 days imprisonment, suspended, and

were placed on probation for a period of 24 months. (

- On August 7, 1994, the applicant was arrested in Santa Rosa, California and charged with knowingly writing a check with insufficient funds in violation of section 476A(a) of the California Penal Code and for disobeying a court order in violation of section 166.4 of the California Penal Code. . The final disposition of this arrest is not known.

- On January 27, 1995, the applicant was arrested in Santa Rosa, California for disobeying a court order in violation of section 166.4 of the California Penal Code and for petty theft in violation of section 488 of the California Penal Code. The FBI rap sheet reflects that on February 7, 1995, the applicant was convicted of theft, a misdemeanor in violation of section 484(a) of the California Penal Code. For this offense, the applicant was sentenced to 30 days in jail.

Neither counsel nor the applicant responded to the NOID. An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1225a(a)(4)(B). An alien applying for adjustment of status to that of a temporary resident has the burden of proving by a preponderance of the evidence that he or she is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). The applicant must therefore demonstrate that his criminal history does not disqualify him for temporary resident status.

Additionally, an alien who has been convicted of a crime involving moral turpitude is inadmissible, and therefore ineligible for temporary resident status. Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

But, an alien with one crime involving moral turpitude conviction is not inadmissible if he or she meets the petty offense exception. *See* section 212(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii). A crime involving moral turpitude 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." *Id.* 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 offense was 15 years).

Here, the record evidence reflects that on July 30, 1993, the applicant was convicted in Santa Rosa, California of misdemeanor "obstructing and/or resisting a public officer," in violation of section 148 of the California Penal Code. For this offense, the applicant was sentenced to 20 days imprisonment, suspended, and were placed on probation for a period of 24 months. Section 148 of the California Penal Code provides, in pertinent part, that:

> (a)(1) Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

In *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005), the Ninth Circuit Court of Appeals stated that the essential elements of resisting or obstructing a peace officer are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer; (2) when the officer was engaged in the performance of his or her duties; and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. In *People v. Christopher*, 137 Cal.App.4th 418 (App. 4 Dist. 2006), the Court stated that although section 148 of the California Penal Code is most often applied to physical acts of defendants, such as physical resistance, hiding, or running away from police officer, prohibited conduct is not limited to nonverbal conduct involving flight or forcible interference with an officer's activities. Instances in which courts have found a violation of section 148 of the California Penal Code include: running and hiding from officers attempting a valid detention, *see People v. Allen*, 109 Cal.App.3d 981 (1980); struggling with officers breaking up a fight, *see people v. Derby*, 177 Cal. App.2d 626 (1960); and kicking peace officers quelling a disturbance, *see People v. Bugg*, 79 Cal.App.2d 174 (1947).

Based on the statutory language and the interpreting case law, section 148 of the California Penal Code encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not. However, in accordance with the Supreme Court's holding in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), we must determine if an actual case exists in which these criminal statutes were applied to conduct that did not involve moral turpitude. A case involving section 148 of the California Penal Code was applied to conduct that did not involve moral turpitude. In the case of *In re Brown*, 9 Cal.3d 612, 624 (1973), the Court found that "going limp upon arrest" was sufficient to satisfy the elements of section 148 of the California Penal Code.

Therefore, we cannot find that that the offenses described in section 148 of the California Penal Code are categorically crimes involving moral turpitude. The AAO must therefore review the

record of conviction to determine if the applicant's conviction under this statute was for morally turpitudinous conduct.

The record of proceedings does not include the record of conviction for this offense. As neither counsel nor the applicant responded to the October 10, 2013 NOID, the applicant has failed to submit the relevant record of conviction. Thus, the record evidence does not contain sufficient information to analyze whether the offense constitutes a crime involving moral turpitude. Specifically, the applicant did not submit the criminal information or indictment for his case, nor did he submit any other documents relating to his conviction which can be examined under the modified categorical approach. It is noted that, unlike a removal hearing in which the government bears the burden of establishing an alien's removability, the burden of proof (including the burden of production) in the present proceedings is on the applicant to establish that she is not inadmissible. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not submitted the full record of conviction or demonstrated that it is unavailable. Consequently, we find that the applicant has not met his burden to demonstrate that the crime he was convicted of was not a crime involving moral turpitude.

The record further shows that on February 7, 1995, the applicant was convicted of theft, a misdemeanor in violation of section 484(a) of the California Penal Code. For this offense, the applicant was sentenced to 30 days in jail. The California offense of theft is found in section 484(a) of the California Penal Code. That section provides, in pertinent part, that:

> Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

The Board in *Matter of Pedroza* determined that misdemeanor petty theft under section 484 of the California Penal Code constitutes a crime involving moral turpitude. 25 I&N Dec. 312, 315-16 (BIA 2012). Additionally, the Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) is a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a), and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). Consequently, the AAO finds that the applicant's February 7, 1995 conviction for theft constitutes a crime involving moral turpitude.

If the applicant has been convicted of two crimes involving moral turpitude, he is ineligible for the petty offense exception found in section 212(a)(2)(A)(ii) of the Act and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Section 245(a)(4)(A) of the Act. No waiver of such ineligibility is available. Section 245A(d) of the Act, 8 U.S.C. § 1255a(d).

Furthermore, despite the request for evidence contained in the NOID, the applicant failed to provide final court dispositions for his March 1, 1993 arrest for disobeying a court order and his August 7, 1994, arrest in California for knowingly writing a check with insufficient funds and disobeying a court order. These deficiencies have not been overcome on certification. The applicant has at least two misdemeanor convictions.

The AAO therefore finds that the submitted documentation is not sufficient to establish eligibility for temporary residence when other information in the record reveals an arrest record. If the evidence of an ultimate disposition is unavailable, the burden is on the applicant to submit credible, probative evidence of unavailability. Federal regulations provide that, in all applications for immigration benefits the applicant must show that the requested evidence is unavailable. In the absence of primary evidence, the applicant must then submit relevant "secondary evidence." If the applicant does not submit secondary evidence, they must submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the events and circumstances. In criminal record cases, this would include affidavits from the prosecuting attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest. *See* 8 C.F.R. § 103.2(b)(2)(i) and (ii).

Accordingly, the applicant has failed to meet his burden of proof to establish his admissibility and eligibility for adjustment to temporary resident status.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's April 09, 2013 decision is affirmed. The Form I-687 application is denied.