



U.S. Citizenship
and Immigration
Services

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DATE **SEP 11 2013**

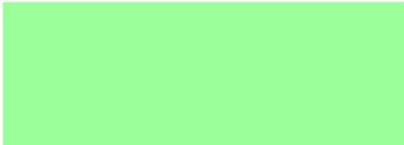
OFFICE: NEBRASKA SERVICE CENTER

IN RE:

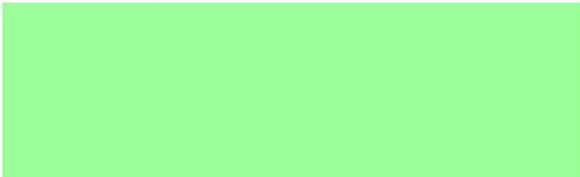


APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

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 August 10, 1987, 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 approved the application on November 14, 1988. However, on May 24, 1990 the director terminated the applicant's status as a temporary resident, finding that the applicant's June 4, 1986 departure pursuant to a deportation order 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 March 22, 2013, the director granted the applicant's motion and reopened the Form I-687 application.²

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

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."

² The record reflects that on April 11, 2013, the director denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, as it was not in the public interest to grant such a waiver to the applicant.

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 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.

In a legal brief dated April 15, 2013, counsel for the applicant states that although he has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, legacy INS and USCIS have failed to provide the applicant with a copy of the tape recording and/or transcript of his deportation proceeding. Counsel asserts that previous FOIA requests have secured only an incomplete deportation record. The record reflects that on January 31, 2005, USCIS fulfilled the applicant's FOIA request, number [REDACTED] and released record material to the applicant. However, from the documentary evidence in the record it does not appear that the applicant ever received a tape recording and/or transcript of the deportation 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 but denied the applicant's Form I-687, Application for Temporary Resident Status, on March 29, 2013, because it found that the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act due to the applicant's departure pursuant to a deportation order dated June 4, 1986. 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 applicant was provided with a complete copy of his deportation file; nor did the director discuss whether the applicant submitted *prima facie* evidence that his deportation order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or resulted in a gross miscarriage of justice, as required by the amended *Proyecto* order.

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).

Counsel for the applicant states that the evidence and circumstances surrounding the applicant's deportation proceeding shows it was defective and entered in violation of the statute and regulation. Counsel contends that the applicant never received notice of the alleged deportation hearing. Counsel also contends that the applicant has not received a complete copy of his deportation file, including the tape recording and/or transcript of his deportation hearing.

In relevant part, counsel asserts that, under the terms of the *Proyecto* amended order, the deportation order occurred in violation of the governing regulations because there is no evidence that the court maintained a recording of the deportation hearing. The relevant regulation in existence at the time of the applicant's deportation hearing, 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." 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. Documentation in the record indicates that USCIS released record material to the applicant pursuant to a FOIA request. However, the current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. It appears that USCIS and EOIR have fully complied with the court's order to provide the applicant with all 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 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).

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); section 245A(a)(4)(B) of the INA.

"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 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).

In addition, an applicant is inadmissible, and therefore ineligible for temporary resident status, 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 Act, as amended, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

An issue to be determined in this proceeding is whether the applicant has furnished sufficient credible evidence that he has no disqualifying criminal convictions, and is thus otherwise admissible to the United States. A review of the record reveals that the applicant has failed to meet this burden because of his criminal conviction for a crime involving moral turpitude.

Section 212(a)(2)(A) of the Act provides, in pertinent part:

(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.

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute “criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied.” *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); see also *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be “a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude.” *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a “realistic probability,” the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probability also exists where the statute expressly punishes conduct not involving moral turpitude. See *U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the “limited, specified set of documents” that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); see also *Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas-Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. See *Olivas-Motta v. Holder*, --- F.3d ---, 2013 WL 2128318 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

The record reflects that on January 14, 1995, the applicant was arrested in [REDACTED] under the name [REDACTED] and charged with kidnapping in violation of the Washington Criminal Code. [REDACTED] In response to a Notice of Intent to Deny/Request for Evidence dated May 21, 2013, the applicant submitted a certified document by the [REDACTED], indicating that the applicant was “released from a felony investigative hold without bond or conditions of release in that no criminal charges will be filed pending further investigation.” The applicant also submitted the complete court docket for the [REDACTED] which shows that the charges were not pursued as the case was dismissed by the prosecutor on January 17, 1995. The record therefore

establishes that there is no conviction against the applicant for the January 1995 arrest for kidnapping. Accordingly, this arrest does not render the applicant ineligible for temporary resident status under section 245A of the Act.

The record further reflects that on September 1, 1989, the applicant was arrested in Washington under the name [REDACTED] and charged in the Superior Court of Washington [REDACTED] with child molestation in the third degree in violation of section 9A.44.089 of the Revised Code of Washington (RCW). On December 7, 1989, a Superior Court Judge entered an order remanding the case to the [REDACTED], finding that "the ends of justice" did not warrant further proceedings at the Superior Court level of the matter. In response to an AAO Notice of Intent to Deny/Request for Evidence, the applicant submitted a document by the deputy clerk of the [REDACTED] District Court certifying that she was "unable to find any records with [REDACTED]"

From the documents submitted by the applicant, the AAO cannot determine whether the "child molestation" charge was dismissed in the District Court or whether the applicant was convicted of this offense or a different offense involving this particular incident. We note that it is not sufficient to meet the applicant's burden of proof to simply provide letters from the [REDACTED] that state no records have been found relating to the charge outlined above. Federal regulations provide that, in all applications or petitions for immigration benefits (temporary resident status in this case) the applicant must show that the requested evidence is unavailable. Any letter that is submitted to show that a criminal record is unavailable must be: (1) an original, (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. 8 C.F.R. § 103.2(b)(2)(ii). The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available. The letter from the Superior Court of California dated August 29, 2007 does not meet these requirements.

In the absence of primary evidence, the applicant must then submit relevant "secondary evidence." 8 C.F.R. § 103.2(b)(2)(ii). If the applicant does not submit secondary evidence, he or she must submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances. *Id.* 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. The AAO notes that despite the Request for Evidence dated May 21, 2013, the applicant did not submit the relevant secondary evidence regarding the final disposition of the September 1, 1989 arrest.

However, the record includes an FBI Criminal History Record (RAP Sheet), which indicates that the applicant's [REDACTED] arrest resulted in the applicant being convicted of a different offense involving this particular incident. The FBI record lists [REDACTED] as the date of the offense and lists the [REDACTED] as the arresting agency. The FBI record shows that for the [REDACTED] arrest, the applicant was convicted on [REDACTED] of

communicating with a minor for immoral purposes in violation of section 9.68A.090 of the RCW. For this offense, the applicant was sentenced to 365 days in jail with 358 days suspended and was fined \$1,000 with \$800 suspended.

At the time of the applicant's conviction, RCW § 9.68A.090 provided that:

- (1) A person who communicates with a minor for immoral purposes is guilty of a gross misdemeanor, unless that person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state, in which case the person is guilty of a class C felony punishable under chapter 9A.20 RCW.
- (2) As used in this section, "minor" means a person under eighteen years of age.

RCW § 9.68A.090 (West 1989)

The Washington Supreme Court has held that the statute prohibiting communication with a minor for immoral purposes is designed to prohibit communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct. *State v. Hosier*, 157 Wash.2d 1, 133 P.3d 936 (2006). For purposes of the statute, "communicate" includes conduct as well as words, and "immoral purpose" refers to sexual misconduct. *Id.* Additionally, the Washington Supreme Court has found that the phrase "immoral purposes" includes, but is not limited to, participation by minors in sexual acts for a fee, or appearance on film or in live performance while engaged in sexually explicit conduct. *State v. Jackman*, 156 Wash.2d 736, 132 P.3d 136 (2006).

The Ninth Circuit Court of Appeals, in the case of *Morales v. Gonzales*, stated that the essential elements of section 9.68A.090 of the RCW are (1) communication (through words or conduct) (2) with a minor or someone the defendant believes to be a minor (3) for immoral purposes of a sexual nature. *Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007), *abrogated on other grounds by Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010). The Ninth Circuit found that sexual communication with a minor is inherently wrong and contrary to the rules of morality and the duties owed between persons. *Id.* The Ninth Circuit therefore held that the full range of conduct prohibited by section 9.68A.090 of the RCW categorically constitutes a crime involving moral turpitude. *Id.* Consequently, the AAO finds that the applicant's December 14, 1989 conviction for communicating with a minor for immoral purposes under section 9.68A.090 of the Revised Code of Washington is categorically a crime involving moral turpitude which renders him inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. As the applicant was sentenced to 365 days imprisonment, the petty offense exception set forth in section 212(a)(2)(A)(II) of the Act is inapplicable to the facts of the present case.

Accordingly, the petitioner is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude, and this constitutes an additional basis for

denial of the temporary resident status application. As such, the AAO need not discuss at this time whether the applicant submitted sufficient evidence to establish by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period.

In light of the applicant's conviction for communicating with a minor for immoral purposes, the applicant is not eligible for temporary resident status on account of his conviction for a crime involving moral turpitude, which renders him inadmissible to the United States. Section 245(a)(4)(A) of the Act. No waiver of such ineligibility is available. Accordingly, the AAO shall not disturb the director's decision denying the applicant's temporary resident status application as the director's decision is affirmed on other grounds.

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 January 14, 2013 decision is affirmed. The Form I-687 application remains denied.