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U.S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship
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FILE: [REDACTED]
MSC-02-022-65161

Office: NEW YORK

Date:

APR 08 2009

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (2000), amended by Life Act Amendments, Pub. L. 106-554, 114 Stat. 2763 (2000).

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office on your appeal. If your appeal was dismissed or rejected, your file has been sent to the National Benefits Center. You no longer have a case pending before this office. If your appeal was sustained or the matter was remanded for further action, your file has been returned to the office that originally decided your case, and you will be contacted. You are not entitled to file a motion to reopen or reconsider your case.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the director, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application based on the determination that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because he failed to establish by a preponderance of credible, probative evidence that he entered the United States prior to January 1, 1982 and resided in a continuous unlawful status through May 4, 1988.

The applicant is represented by counsel on appeal. Counsel asserts that the director failed to assign appropriate weight to the affidavits and other documents offered in support of the application. 8 C.F.R. § 245a.12(f). No additional evidence is submitted on appeal.

Section 1104(c)(2)(B) of the LIFE Act states:

(i) In General – The alien must establish that the alien entered the United States before January 1, 1982, and that he or she has resided continuously in the United States in an unlawful status since such date and through May 4, 1988. In determining whether an alien maintained continuous unlawful residence in the United States for purposes of this subparagraph, the regulations prescribed by the Attorney General under section 245A(g) of the Immigration and Nationality Act (INA) that were most recently in effect before the date of the enactment of this Act shall apply.

An applicant for permanent resident status under section 1104 of the LIFE Act has the burden to establish 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 and is otherwise eligible for adjustment of status under this section. 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.12(e).

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).

Furthermore, an alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. 8 C.F.R. § 245a.3(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).

Additionally, an applicant who has been convicted of a crime involving moral turpitude (CIMT) is inadmissible, and therefore ineligible for permanent 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).¹

In this case, the record contains a letter from [REDACTED], dated July 19, 2004. Mr. [REDACTED] states that he was employed by the New York State Attorney General’s Office in 1988 as a member of their Medicaid Fraud Control Unit. He was the principal attorney charged with prosecuting the applicant and several co-defendants who were involved in a large scale Medicaid fraud operation (Indictment No. 1682/88). The letter also states that the applicant “acknowledged his responsibility early on in the investigation and then cooperated with the office and assisted in the prosecution of the major defendants.” FBI documents reveal that on March 29, 1989, the applicant pleaded guilty to *grand larceny in excess of one million dollars*, and was sentenced to one year of imprisonment.

The issue in this case is whether the applicant’s criminal conviction for grand larceny disqualifies him for adjustment to permanent resident status under the terms of the LIFE Act.²

¹ An applicant for admissibility who stands convicted of a CIMT may also 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).

² The decision of the district director does not address the immigration consequences of the applicant’s criminal conviction. The decision to deny the application (Form I-485) relies upon the paucity of credible evidence regarding the applicant’s date of first entry into the United States and continued residence during the requisite period. The AAO has reviewed the evidence of entry and residence in this case, and we agree generally with the analysis of the director.

The AAO has reviewed the New York State Penal Code regarding the crime of grand larceny. Grand larceny is considered a felony offense in Chapter 155.42 of the New York State Penal Code. Furthermore, this case arises within the jurisdiction of the Second Circuit Court of Appeals. The Court has ruled that larceny is a CIMT for immigration purposes. *See Mendez v. Mukasey*, 547 F.3d 345 (2nd Cir. 2008) (larceny conviction for filing false claim for benefits is a CIMT).

Furthermore, the record before the AAO contains court documents indicating that on April 25, 1989, the sentencing court granted the applicant a judicial recommendation against deportation (JRAD), over the objections of the legacy INS. *See* 8 U.S.C. § 1251(b)(2) (1988) (repealed 1990)³. The AAO has reviewed the documents in the file regarding the court's action in granting the JRAD. These documents include the applicant's Motion for Judicial Recommendation Against Deportation and Exclusion and supporting memorandum of law dated April 11, 1989, the legacy INS Memorandum of Law in Opposition to Defendant's Motion⁴ dated April 19, 1989, and the trial court's order dated April 25, 1989 granting the petition. Additionally, the AAO has also examined the applicable law of the Second Circuit regarding the immigration consequences of a JRAD.

The AAO notes that the applicant's memorandum of law in support of the JRAD acknowledges its limited scope, "[a]lthough the judicial recommendation does not avoid all Immigration (sic) consequences of a criminal conviction (*it may affect an application for adjustment of status or other discretionary relief, it does absolutely bar the INS from using the conviction as a basis for deportation...*) (emphasis added). Our review of applicable Second Circuit case law leads us to conclude that, although a JRAD may not be used to effect the removal of an alien who stands convicted of a CIMT, it carries no weight in determining an alien's admissibility. *See Phong Thanh Nguyen v. Chertoff*, 501 F.3d 107 (2nd Cir. 2007).

The AAO concludes that the applicant remains ineligible to adjust status to one of permanent residence on two grounds: (1) because of his felony conviction and (2) because the conviction involves a CIMT. The applicant's felony conviction does not meet the "petty offense" exception or the "youthful offender" exception because the statutory maximum sentence to which the applicant is exposed exceeds one year incarceration and the offense was not committed when the applicant was under 18 years of age.

Additionally, the AAO will examine the immigration consequences of the applicant's criminal conviction.

³ In 1990, Congress repealed the JRAD statute. *See* Immigration Act of 1990 (IMMACT); Pub. L. 101-649, § 505, 104 Stat. 4978, 5050.

⁴ The AAO notes that in filing its opposition to the motion for a JRAD, the legacy INS was compelled to rely upon the assertions of the applicant's trial counsel at the time, as the applicant was not in removal proceedings and no corresponding file existed to assist the INS in its analysis.

The AAO concludes that the applicant is ineligible for permanent resident status pursuant to the terms of the LIFE Act, as he cannot establish that he is otherwise admissible to the United States on account of his felony conviction for a crime involving moral turpitude. There is no waiver available for a conviction for a CIMT. Section 245A(d)(2)(B)(ii); 8 U.S.C. § 1255a(d)(2)(B)(ii).

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