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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

MSC-03-056-60976

Office: LOS ANGELES

Date:

OCT 05 2009

IN RE:

Applicant:

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.


Perry Rhew
Chief, Administrative Appeals Office

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

The director denied the application on March 16, 2009, based on the determination that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because she had a felony conviction in the state of California. *See Section 1104(c)(2)(D)(ii) of the LIFE Act.* Specifically, the director noted that the applicant had a felony conviction for one count of violating section 10980(c)(2) of the California Welfare and Institutions Code – *welfare fraud in excess of \$400.* The director concluded that the applicant’s felony conviction precluded her adjustment to permanent resident status under the LIFE Act. *See 8 C.F.R. § 245a.11(d)(1).*

The applicant, who is represented by counsel on appeal, filed a timely Notice of Appeal (Form I-290B). Counsel argues that the applicant is eligible for status as a permanent resident under the LIFE Act because her felony conviction was reclassified by the trial court as a misdemeanor pursuant to section 17(b) of the California Penal Code. Consequently, counsel alleges that the applicant is otherwise eligible for permanent resident status because the record establishes that her one misdemeanor conviction does not disqualify the applicant for status under the LIFE Act.

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 “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.* 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 or 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.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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).

“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).

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).

The AAO has reviewed all of the documents in the file, including the criminal records and the California statute under which the applicant was convicted. The record contains court documents that reveal that on October 23, 1990, the applicant was charged with one felony count of violating section 10980(c)(2) of the California Welfare and Institutions Code – *welfare fraud*; and one count of violating section 118 of the California Penal Code – *perjury*.

On November 2, 1990, the applicant pleaded guilty to the first count of welfare fraud, and the perjury charge was dismissed pursuant to the terms of a plea agreement. The applicant was sentenced to 36 months of probation, and ordered to perform 48 hours of community service. The term of probation was extended an additional 24 months on account of the applicant's failure to make timely restitution. See Transcript p. 73, Hearing before immigration judge, July 6, 2004.

Thereafter, on September 18, 2000, the applicant filed a petition with the trial court to expunge the conviction pursuant to section 1203.4 of the California Penal Code, and to reclassify the felony conviction as a misdemeanor pursuant to section 17(b) of the California Penal Code. The applicant's petition was denied by the court. However, on October 20, 2008, the applicant filed a motion to reconsider the earlier denial with the same trial court. The court granted the applicant's motion for reconsideration on December 16, 2008, and ordered that the applicant's conviction be expunged pursuant to section 1203.4 of the California Penal Code, and that the felony conviction be reclassified as a misdemeanor pursuant to section 17(b) of the California Penal Code.

The issue in this case is whether the court's subsequent expungement and reclassification of the applicant's felony conviction as a misdemeanor offense is valid for immigration purposes. The AAO must also determine whether the applicant is otherwise admissible as a lawful permanent resident pursuant to the terms of the LIFE Act.

Section 10980(c)(2) of the California Welfare and Institutions Code provides as follows:

c) Whenever any person has, willfully and knowingly, with the intent to deceive, by means of false statement or representation, or by failing to disclose a material fact, or by impersonation or other fraudulent device, obtained or retained aid under the provisions of this division for himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished as follows:

(2) If the total amount of the aid obtained or retained is more than four hundred dollars (\$400), by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars (\$5,000), or by both imprisonment and fine; or by imprisonment in the county jail for a period of not more than one year, by a fine of not more than one thousand dollars (\$1,000), or by both imprisonment and fine.

First, the AAO notes that the state court's expungement of the conviction under section 1203.4 of the California Penal Code does not eliminate the immigration consequences of the applicant's conviction. This particular section of the California Penal Code is a rehabilitative type statute which serves to dismiss, cancel, or vacate a prior conviction as a result of the successful completion of a term of probation, restitution, or other condition of sentencing. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. In general, the Ninth Circuit has consistently ruled that a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type rehabilitative statute unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).¹ Thus, the court's order of December 16, 2008, that expunged the applicant's felony conviction under section 1203.4 of the California Penal Code is ineffective to remove the immigration effect of the underlying conviction.

In contrast, that part of the court's order of December 16, 2008, that reclassified the criminal offense pursuant to section 17(b) of the California Penal Code from a felony to a misdemeanor is entitled to full faith and credit in immigration proceedings. Section 17(b) of the California Penal Code does not serve to dismiss or otherwise vacate a conviction subsequent to the completion of a term of probation. This particular section defines the range of punishments for both felony and misdemeanor offenses, when the trial court may exercise its discretion in determining the punishment to be imposed under a "wobbler" statute.

The statute under which the applicant was charged, section 10980(c)(2) of the California Welfare and Institutions Code, is clearly a "wobbler" statute, in that it carries a range of punishment from imprisonment in the county jail up to one year and/or a fine up to \$1,000 or imprisonment in the state prison up to three years and/or a fine up to \$5,000. In this case, the applicant was ordered to perform 48 hours of community service, and placed on a term of probation for 3 years. The court documents identify the applicant's offense initially as a felony, and her first attempt to reduce the felony conviction to a misdemeanor were denied by the court September 18, 2000. However, approximately eight years later, the applicant's motion to reconsider the denial was

¹ See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); *see also de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

granted, and the court reduced the felony conviction to a misdemeanor by order dated December 16, 2008. Because the reclassification was done pursuant to section 17(b) of the California Penal Code, the court's decision is entitled to full faith and credit for purposes of establishing eligibility for adjustment of status. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003); *In re Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005).

Therefore, the applicant, for purposes of applying for adjustment of status under the LIFE Act, stands convicted of a misdemeanor crime involving fraud. The AAO must examine whether the conviction for welfare fraud is a conviction for a crime involving moral turpitude (CIMT). The Ninth Circuit has explained that a CIMT involves "base, vile, and depraved conduct that shocks the conscience and is contrary to the societal duties we owe each other." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1069 (9th Cir. 2007) (en banc) (holding that accessory after the fact offense was not a CIMT); *see also Blanco v. Mukasey*, 518 F.3d 714, 718 (9th Cir. 2008) (holding that crime of false identification to a peace officer is not categorically a 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. 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).")

As noted *supra*, an applicant who has been convicted of a 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). The AAO has reviewed the statute under which the applicant was convicted, and we note that the statutory maximum punishment for welfare fraud that may be imposed by the court is imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars (\$5,000), or by both imprisonment and fine. Therefore, the conviction for welfare fraud does not meet the petty offense exception, and thereby disqualifies the applicant for permanent residence under the LIFE Act. *See* 8 U.S.C. § 1182(a)(2)(A)(ii).

The AAO concludes that the applicant has not established by a preponderance of credible, probative evidence that she is otherwise admissible to the United States pursuant to the terms of the LIFE Act.



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