

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**PUBLIC COPY**

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**

L2

[Redacted]

FILE: [Redacted]  
MSC-02-194-62040

Office: SAN FRANCISCO

Date: **AUG 03 2010**

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:

[Redacted]

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 of the San Francisco office, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application, finding that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because he has a conviction for burglary, a crime involving moral turpitude (CIMT).

On appeal, counsel does not contest the fact that the applicant has been convicted of burglary. Counsel asserts that the applicant is eligible for adjustment to permanent resident status under the LIFE Act because his conviction for burglary is not a CIMT or, in the alternative, if the applicant is found to have been convicted of a CIMT, this basis of inadmissibility is waivable. On appeal, counsel states that a brief and/or additional evidence will be submitted within 30 days. Counsel has not submitted a brief. The applicant has not submitted any additional evidence on appeal.<sup>1</sup>

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.

---

<sup>1</sup> The applicant's FOIA request NRC2009052878 was closed on November 6, 2009 for failure to comply.

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 February 7, 1987, the applicant was charged with one felony count of violating section 459 of the California Penal Code (PC), *burglary*, one misdemeanor count of

violating PC section 466, *possession of burglary tools*, one misdemeanor count of violating section 10852 of the California Vehicle Code (VC), *tamper with auto*, and one misdemeanor count of violating VC section 10853, *malicious mischief to auto*. The record contains a minute order, stating that on April 20, 1987, the applicant pleaded guilty to one count of PC section 459, as a misdemeanor in the second degree, and the remaining charges were dismissed pursuant to the terms of a plea agreement. The applicant was sentenced to 36 months supervised probation, with suspended 12 months in the county jail. The applicant was ordered to serve 60 days in the county jail, with 4 days credit for time served. (Superior Court of California, San Francisco County, case number 00966904).<sup>2</sup>

Section 459 of the California Welfare and Institutions Code provides as follows:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Section 460 of the California Penal Code states:

- (a) Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.
- (b) All other kinds of burglary are of the second degree...

Section 461 of the California Penal Code states

Burglary is punishable as follows:

---

<sup>2</sup> The applicant also pleaded *nolo contendere* to a violation of VC section 23152(B), *DUI*, on August 20, 1987.

- (a) Burglary in the first degree: by imprisonment in the state prison for two, four, or six years.
- (b) Burglary in the second degree: by imprisonment in the county jail not exceeding one year or in the state prison.

The statute under which the applicant was charged, PC section 459, is clearly a “wobbler” statute, in that it carries a range of punishment from imprisonment in the county jail or state prison up to one year, or imprisonment in the state prison up to six years. In this case, the applicant received a suspended sentence of 12 months in the county jail and was placed on a term of probation for 3 years. The court documents identify the applicant’s offense initially as a felony, and identify the charge to which he pleaded guilty as a misdemeanor of the second degree. Therefore, the applicant, for purposes of applying for adjustment of status under the LIFE Act, stands convicted of a misdemeanor crime of burglary.

In addition, the AAO finds that the applicant’s conviction for burglary is a conviction for a crime involving mortal 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 (9<sup>th</sup> Cir. 2008) (per curiam) (“Petty theft is a crime involving moral turpitude under 8 U.S.C. § 1229b(b)(1)(B).”) The statute under which the applicant was convicted required that the applicant intended to commit grand or petit larceny or any felony.

Moreover, 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 applicant does not meet the petty offense exception because, although the maximum penalty possible for the crime of which the applicant was convicted did not exceed imprisonment for one year, the applicant was sentenced to a term of imprisonment in excess of 6 months. Therefore, the applicant’s conviction for burglary 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). Within the provisions of the LIFE Act, there is no waiver available to an alien convicted of a CIMT committed in the United States.

The AAO concludes that the applicant has not established by a preponderance of credible, probative evidence that he 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.