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

U.S. Citizenship and Immigration Services

L2

[redacted]

FILE: [redacted] Office: LOS ANGELES Date: MAR 02 2010

MSC-03-056-60976

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 in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

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 Los Angeles office. The Administrative Appeals Office (AAO) originally dismissed the appeal on October 5, 2009, based upon the applicant's ineligibility due to a prior criminal conviction. The AAO *sua sponte* reopens the proceeding and withdraws its decision dated October 5, 2009.[1] The adjudication of the applicant's appeal is pending.

On October 5, 2009, the Administrative Appeals Office (AAO) dismissed applicant's appeal. The AAO determined that the applicant's misdemeanor conviction was a crime involving moral turpitude (CIMT), and concluded that, since the maximum possible sentence for the offense if treated as a felony was in excess of six months, the applicant did not qualify for the petty offense exception of 8 U.S.C. § 1182(a)(2)(A)(ii), and was, therefore, ineligible for adjustment to permanent resident status under the LIFE Act. *See* 8 C.F.R. § 245a. 18(a)(l). Counsel contends that the AAO erred in treating the conviction as a felony in its examination of whether the conviction falls within the petty offense exception. Counsel requests a *sua sponte* reopening of the case. In response, the AAO has *sua sponte* reopened its prior decision. The October 5, 2009 decision of the AAO will be withdrawn. The adjudication of the applicant's appeal, as it relates to her claim of continuous residence in an unlawful status in the United States since prior to January 1, 1982 and through May 4, 1988, is pending.

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

[1] Motions to reopen a proceeding or reconsider a decision on an application for permanent resident status under section 1104 of the LIFE Act are not permitted. 8 C.F.R. § 245a.20(c). The AAO may, however, *sua sponte* reopen any proceeding conducted by the AAO under 8 C.F.R. § 245a and reconsider any decision rendered in such proceeding. 8 C.F.R. § 103.5(b).

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).

Further, 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 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*. [redacted] 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).[2] 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 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

[2] 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).

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 welfare fraud.

Further, the AAO finds that the applicant's conviction for welfare fraud is a conviction for a crime involving mortal turpitude (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).")

Moreover, as noted *supra*, an applicant who has been convicted of a CIMT is inadmissible, and therefore ineligible for permanent resident status. However, an alien with one CIMT is not inadmissible if he or she meets the petty offense exception, which requires that the maximum penalty possible for the crime of which the alien was convicted did not exceed imprisonment for one year, and that the alien was not sentenced to a term of imprisonment in excess of 6 months. 8 U.S.C. § 1182(a)(2)(A)(ii). The AAO finds that the applicant's misdemeanor conviction qualifies for the petty offense exception, since the maximum possible penalty for a misdemeanor in California is six months. *See* California Penal Code, Section 19. In addition, the applicant was not sentenced to a term of imprisonment in excess of six months, but was placed on probation. Therefore, the applicant's misdemeanor conviction is not grounds for denial of this application.

ORDER: The AAO withdraws its decision dated October 5, 2009. The adjudication of the applicant's appeal, as it relates to her claim of continuous residence in an unlawful status in the United States since prior to January 1, 1982 and through May 4, 1988, is still pending.