



U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



H2

FILE: [REDACTED]

Office: LOS ANGELES, CA

Date: **DEC 18 2008**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application declared moot. The matter will be returned to the district director for continued processing.

The record reflects that the applicant, a native and citizen of Ghana, was convicted, in March 1997, of Knowingly Accessing Computer to Defraud, a violation of section 502(c)(1) of the California Penal Code.¹ The applicant was placed on probation for three years, was ordered to serve 120 days in the county jail, and was required to make restitution. Based on this conviction, the district director concluded that the applicant was inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and children.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated July 18, 2006.

Section 212(a)(2)(A) of the Act states 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.
- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

¹ Section 502(c)(1) of the California Penal Code states, in pertinent part:

[A]ny person who commits any of the following acts is guilty of a public offense:

- (1) Knowingly accesses and without permission alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data.

- (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

On appeal, counsel asserts that the applicant's above-referenced conviction falls within the petty offense exception set forth in the Act. As counsel asserts on appeal,

[the applicant] contends that he is not inadmissible under INA § 212(a)(2)(A)(i)(I) because his conviction falls within the petty offense exception of INA § 212(a)(2)(A)(ii)(II). [redacted] conviction under C.A. P.C. § 502 (c)(1) is a wobbler, to wit, an offense that can be either a misdemeanor of [sic] felony. See C.A. P.C. § 502(d)(1) ².

In cases where a wobbler is involved, California law classifies an offense as a misdemeanor when the defendant is not sentenced to state prison. See C.A. P.C. § 17(b)(1).³ In our case, [redacted] was sentenced to 120 days in county jail. [redacted] completed his sentence and was never sentenced thereafter to state prison on any type of probation violation. Therefore, under operation of California law, his offense is a misdemeanor.

As a misdemeanor, [redacted] offense cannot possibly carry a sentence of up to three (3) years as indicated in your decision at page two. See

² Section 502(d)(1) of the California Penal Code states, in pertinent part:

Any person who violates any of the provisions of paragraph (1), (2), (4), or (5) of subdivision (c) is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in the state prison for 16 months, or two or three years, or by both that fine and imprisonment, or by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in the county jail not exceeding one year, or by both that fine and imprisonment.

³ Section 17(b)(1) of the California Penal Code states, in pertinent part:

When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

- (1) After a judgment imposing a punishment other than imprisonment in the state prison.

C.A. P.C. § 19.⁴ Therefore, because [REDACTED] offense is a misdemeanor and he received a sentence of less than six (6) months, his offense falls within the petty offense exception.... Therefore, [REDACTED] does not even require an I-601 waiver....

Brief in Support of Appeal.

To further support counsel's contentions, the AAO notes that in *Accord [REDACTED]. Ashcroft*, 334 F.3d 840 (9th Cir. 2003), the United States Court of Appeals concluded as follows:

Specifically, [REDACTED] asserts that his guilty plea conviction pursuant to a California "wobbler" statute, under which the offense may be treated as either a misdemeanor or a felony, did not result in a conviction of a crime for which the maximum penalty exceeds imprisonment for one year. Because we determine that the state court's declaration that [REDACTED] offense was a misdemeanor is binding on [REDACTED] subsequent immigration proceedings, we reverse.

[W]e find that the BIA erred in determining that it was not bound by the state court's designation of [REDACTED] offense as a misdemeanor. Because the penalty for the offense did not exceed imprisonment for one year, and because [REDACTED] received an actual sentence of less than six months, [REDACTED] qualified for the petty offense exception.

The AAO finds counsel's assertions to be convincing. The AAO thus concludes that counsel has established that the applicant was convicted of only one crime, that the crime qualifies under the petty offense exception to inadmissibility under section 212(a)(2)(A) of the Act, and that the applicant is not otherwise inadmissible. As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act is moot and will not be addressed. Accordingly, the appeal will be dismissed, the prior decision of the district director is withdrawn and the instant application for a waiver is declared moot.

ORDER: The appeal is dismissed, the prior decision of the district director is withdrawn and the instant application for a waiver is declared moot. The district director shall continue processing the adjustment application (Form I-485) accordingly.

⁴ Section 19 of the California Penal Code states, in pertinent part:

[E]very offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.