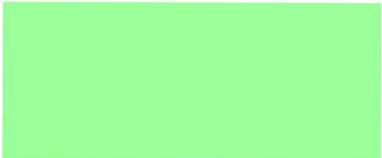




U.S. Citizenship  
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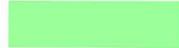


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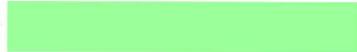
JUN 27 2013

Office: MANILA

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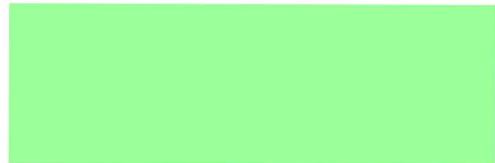
IN RE:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility pursuant to Section 212(h)  
of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Manila, Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. As the applicant is not inadmissible, the appeal will be dismissed as unnecessary.

The applicant is a native and citizen of Fiji who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, and section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for seeking admission to the United States within ten years of being removed.<sup>1</sup> He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse and children. He also seeks Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

The director concluded that the applicant had failed to demonstrate extreme hardship to his qualifying spouse and denied the waiver application accordingly. *See Decision of the Field Office Director*, dated May 29, 2012.

On appeal, counsel for the applicant contends that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act because his conviction was reduced from a felony to a misdemeanor, so he qualifies for the petty offense exception at section 212(a)(2)(A)(ii)(II) of the Act. Counsel also contends that the field office director erred in finding that the applicant's qualifying spouse would not experience extreme hardship if the waiver application were denied.

The record includes, but is not limited to: statements from the applicant and his spouse, medical records relating to the applicant's father-in-law, documentation relating to the applicant's criminal history, a psychological evaluation and medical records regarding the applicant's spouse, educational records relating to the applicant's eldest son, a letter from the applicant's mother-in-law, and country conditions information. The entire record was reviewed and considered in rendering a decision on the appeal.

The applicant entered the United States as a B-2 visitor on November 26, 1996. He filed a timely application for asylum, which was denied, and an immigration judge ordered him removed on March 31, 1999. The applicant and his qualifying spouse were married on April 10, 1999. The applicant's appeal of his asylum application was dismissed on October 1, 2002 and he was granted 30 days for voluntary departure. Counsel for the applicant filed a motion to reopen

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<sup>1</sup> To overcome this ground of inadmissibility, the applicant also filed a Form I-212, Permission to Reapply for Admission into the United States after Deportation or Removal, pursuant to section 212(a)(9)(A)(iii) of the Act. The director denied that application in a separate decision and the applicant did not appeal that decision by filing a Form I-290B, Notice of Appeal or Motion. Therefore, we will only address the denial of the applicant's Form I-601 application in this decision.

that same day and the motion was dismissed on March 7, 2003. The applicant was removed at government expense on September 15, 2003.

Section 212(a)(2) of the Act states, in pertinent part:

Criminal and related grounds. —

(A) Conviction of certain crimes. —

- (i) In general. — Except as provided in clause (ii), any 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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The record reflects that on April 11, 2002 the applicant pled nolo contendere to disturbing the peace in violation of Cal. Penal Code § 415. On July 23, 2003, the applicant was convicted of willful infliction of corporal injury on his spouse in violation of Cal. Penal Code § 273.5(a) and was sentenced to a period of probation for five years under the condition that he serve 126 days in the [redacted] County Jail and pay designated fines. The applicant was found inadmissible on the basis of his conviction for willful infliction of corporal injury to his spouse.

The Ninth Circuit Court of Appeals has held that a conviction under Cal. Penal Code § 273.5(a) is categorically a crime involving moral turpitude. In *Grageda v. INS*, the Ninth Circuit held, “Because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements . . . spousal abuse under section 273.5(a) is a crime of moral turpitude.” 12 F.3d 919, 922 (9th Cir. 1993); *see also Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) (“[W]e rule that inflicting ‘cruel or inhuman corporal punishment or injury’ upon a child is so offensive to American ethics that the fact that it was done purposely or willingly (the California definition of ‘willful’) ends debate on whether moral turpitude was involved. When the crime is this heinous, willful conduct and moral turpitude are synonymous terms.”). The AAO concurs that the applicant’s conviction is for a crime involving moral turpitude that renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

On appeal, counsel for the applicant concedes that the applicant’s conviction is for a crime involving moral turpitude. However, counsel claims that the applicant is not inadmissible because his conviction falls under the petty offense exception at section 212(a)(2)(A)(ii)(II) of the Act. Counsel notes that a conviction is considered a petty offense where 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 six months. Counsel states that although the applicant’s original conviction was for a felony, his conviction

was reduced to a misdemeanor on May 14, 2010. Counsel asserts that because the maximum penalty for a misdemeanor conviction of Cal. Penal Code § 273.5(a) was imprisonment for not more than one year and the applicant was sentenced to 126 days in jail, the conviction falls within the petty offense exception.

The petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act provides:

(ii) Exception  
Clause (i)(I) shall not apply to an alien who committed only one crime if—

...

(II) 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 (regardless of the extent to which the sentence was ultimately executed).

According to Cal. Penal Code §273.5(a), a person convicted under the statute is “guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.” Because the offense can result in a range of punishments, it is referred to as a “wobbler” statute, providing for either a misdemeanor or a felony conviction. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003). Whether a “wobbler” is determined to be a misdemeanor or a felony is controlled by California Penal Code § 17(b), which sets out the range of judgments by which an offense is categorized “for all purposes” subsequent to judgment. *Id.* Section 17(b) of the California Penal Code provides, in pertinent part:

(b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

...

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

The court certified record in the present case reflects that on May 14, 2010, the applicant's Petition for Reduction of Felony to Misdemeanor Pursuant to the Provisions of Penal code Section 17 was granted. With regard to a sentence modification, in *Matter of Cota-Vargas*, the Board of Immigration Appeals gave, for immigration purposes, "full and faith and credit to the decision of California Superior Court modifying the respondent's sentence, nunc pro tunc, from 365 days to 240 days," even though the modification was not to correct any substantive or procedural defect in the original judgment. 23 I&N Dec. 849 (BIA 2005). In view of the holding in *Cota-Vargas*, the AAO will give full faith and credit to the trial court's designation of the applicant's offense as a misdemeanor rather than a felony. Because the maximum possible penalty for the applicant's misdemeanor offense did not exceed one year, and because the applicant's actual sentence was less than six months, he qualifies for the petty offense exception to inadmissibility. Therefore, the applicant's conviction under Cal. Penal Code §273.5(a) does not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The finding of inadmissibility is withdrawn. As the applicant is not inadmissible, the waiver application is unnecessary. Accordingly, the appeal will be dismissed as moot.

**ORDER:** As the waiver application is not necessary, the appeal is dismissed.