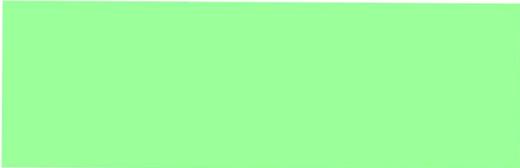
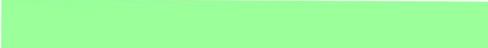




U.S. Citizenship
and Immigration
Services

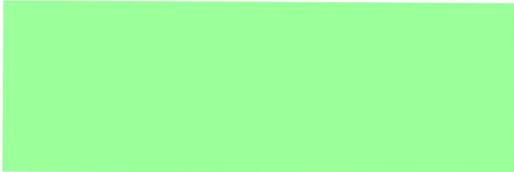
(b)(6)



Date: **JAN 21 2015** Office: NEBRASKA SERVICE CENTER FILE: 
IN RE: Applicant: 

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

R

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of Mexico who was found to be 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 seeks a waiver under 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.

The Director concluded that the applicant was convicted of a crime involving moral turpitude. The Director further concluded that the applicant's conviction for assault with a deadly weapon is a conviction for a violent or dangerous crime under 8 C.F.R. §212.7(d), and the applicant failed to establish that he qualifies for an exception due to extraordinary circumstances in order for U.S. Citizenship and Immigration Services (USCIS) to favorably exercise discretion. The Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Director*, dated April 23, 2014.

On appeal, counsel contends that the applicant's conviction for assault with a deadly weapon qualifies for the petty offense exception and that he is therefore not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. Counsel further asserts that a recent decision of the U.S. Court of Appeals for the Ninth Circuit held that the statute under which the applicant was convicted is not categorically a crime involving moral turpitude.

The record includes, but is not limited to, the following documentation: a statement from counsel in support of the Form I-290B, Notice of Appeal or Motion; a statement from the applicant's spouse; a psychological evaluation for the applicant's spouse; and the applicant's criminal records. The entire record was reviewed and considered in rendering a decision on the appeal.

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 (other than a purely political offense) 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—

(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 six months (regardless of the extent to which the sentence was actually executed).

On appeal, counsel asserts that the applicant's misdemeanor conviction for assault with a deadly weapon in violation of California Penal Code (Cal. Penal Code) § 245(a)(1) qualifies for the petty offense exception and that the applicant is therefore not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Upon review, the applicant's assertions are persuasive.¹

The record reflects that on November [REDACTED] the applicant was charged with assault with a deadly weapon in violation of Cal. Penal Code § 245(a)(1). On September [REDACTED] the Superior Court for [REDACTED] County sentenced the applicant to three years of probation and five months in county jail, with the imposition of sentence suspended for the probation period. On August [REDACTED], the applicant's motion for reduction to a misdemeanor pursuant to Cal. Penal Code § 17(b) was granted.

Counsel asserts that the applicant's conviction meets the requirements of the petty offense exception. Counsel states that when a California "wobbler offense" originally designated as a felony is re-designated or reduced to a misdemeanor, the offense has a potential sentence of one year for immigration purposes and can come within the petty offense exception to inadmissibility for a crime of moral turpitude, and cites *Lafarga v. INS*, 170 F.3d 1213 (9th Cir. 1999) and *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003). Counsel, citing *Garcia-Lopez*, further states that a state court's designation of a wobbler offense as a misdemeanor is binding on the BIA for the purpose of applying the petty offense exception.

In California, "[a] felony is a crime that is punishable with death, by imprisonment in the state prison, or ... by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170." Cal. Penal Code § 17(a). "Every other crime ... is a misdemeanor..." *Id.* Some crimes, however, are punishable by *both* felony-type punishments and non-felony-type punishments—for example, by imprisonment in state prison (felony-type punishment) and by imprisonment in county jail (non-felony-type punishment). Those crimes are known as "wobblers." *See generally Ewing v. California*, 538 U.S. 11, 16–17, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (describing "wobblers"). The criminal statute under which the applicant was convicted is a "wobbler," as the offense can be punished either as a felony or as a misdemeanor. *See Ceron v. Holder*, 747 F.3d 773, 777 (9th Cir. 2014) (holding that Cal. Penal Code § 245(a)(1) is a "wobbler" statute because the state court can treat a conviction under this statute as either a felony or a misdemeanor).

¹ On appeal, counsel asserts that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and states that the U.S. Court of Appeals for the Ninth Circuit found in *Ceron v. Holder*, 747 F.3d 773 (9th Cir. 2014), that California Penal Code § 245(a)(1) is not categorically a crime of moral turpitude. In *Ceron*, the Ninth Circuit remanded the case to the Board of Immigration Appeals (BIA) to determine whether California Penal Code § 245(a)(1) is categorically a crime of moral turpitude. 747 F.3d at 784-85. However, we need not determine whether the statute the applicant was convicted under is a crime involving moral turpitude as we find that the applicant would qualify for the petty offense exception even if the crime were found to involve moral turpitude.

In *Garcia-Lopez*, the Ninth Circuit stated that Cal. Penal Code § 17(b) controls whether a “wobbler” is a misdemeanor or a felony because it sets out the range of judgments by which an offense is categorized “for all purposes” subsequent to judgment. 334 F.3d at 842.

Section 17(b) of the California Penal Code provides, 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.

....

(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 record reflects that on September [REDACTED] the applicant was convicted of assault with a deadly weapon in violation of Cal. Penal Code § 245(a)(1), and the Superior Court for [REDACTED] County sentenced him to probation for three years and five months in county jail, with the imposition of sentence suspended for the probation period. On August [REDACTED] the court granted the applicant’s motion for reduction to a misdemeanor pursuant to Cal. Penal Code § 17(b).

In *People v. Howard*, the California Supreme Court stated: “When the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation.” 16 Cal.4th 1081, 1087, 68 Cal.Rptr.2d 870 (1997). Thus, because the court in the applicant’s criminal case suspended imposition of sentence, no judgment was pending against the applicant, and he was subject only to the terms and conditions of his probation. Furthermore, we note the applicant’s offense was reduced to a misdemeanor upon motion of the applicant.

In *People v. Wood*, 62 Cal.App.4th 1262, 1267, 73 Cal.Rptr.2d 308 (1998), the Court stated that the plain meaning of Cal. Penal Code § 17(b)(3) is that “[e]ither the court may declare the offense to be a misdemeanor at the time of granting probation or it may do so on application of the defendant or the probation officer thereafter. The introductory clause, ‘When the court grants probation to a defendant without imposition of sentence,’ applies in both cases.” *Id.* at 1267-8.

In *Garcia-Lopez*, the Ninth Circuit found that a state court’s designation of a wobbler offense as a misdemeanor was binding on the BIA for the purpose of applying the petty offense exception. 334 F.3d at 845 (*citing Lafarga v. INS*, 170 F.3d 1213, 1216 (9th Cir. 1999)). The court stated that in construing the effects of Cal. Penal Code § 17(b), “courts have repeatedly emphasized the significance of a state court’s actions in specifically determining that an offense is a misdemeanor, either at the time of probation, or ‘thereafter.’” 334 F.3d at 845 (emphasis added).

The Ninth Circuit acknowledged that the BIA permissibly construed portions of a 1996 amendment to the Immigration and Nationality Act to preclude “the recognition of subsequent state rehabilitative expungement of convictions.” *Id.* (citing *Matter of Roldan*, 22 I.&N. Dec. 512 (BIA)). However, the Ninth Circuit noted that a state court expungement of a conviction is qualitatively different from a state court order to classify an offense or modify a sentence and stated that a when a state court issues an order to classify an offense, that court is clearly construing the nature of the conviction pursuant to state law. *Id.* at 846.

Consequently, in view of the Ninth Circuit decisions discussed herein, we find that Cal. Penal Code § 17(b)(3) applies in the applicant’s case and that the superior court designated the applicant’s assault with a deadly weapon offense to be a misdemeanor.² As such, we find that the applicant’s offense falls within the petty offense exception in section 1182(a)(2)(A)(ii)(II) of the Act, and his conviction does not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Because the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, he does not require a waiver under section 212(h) of the Act. The appeal will be dismissed because the applicant is no longer inadmissible and the underlying waiver application is unnecessary.

ORDER: The appeal is dismissed as the underlying waiver application is unnecessary

² In the same order, the court vacated the applicant’s conviction pursuant to Cal. Penal Code § 1203.4, which provides, in pertinent part, for dismissal of charges following successful completion of probation. As the plea was set aside and the action dismissed under a state rehabilitative statute, the court’s order vacating the conviction has no effect in immigration proceedings. *See Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). The applicant does not claim, however, that this post-conviction relief served to eliminate the conviction for immigration purposes. Rather, the applicant asserts that because of the reduction of the offense to a misdemeanor by the court pursuant to Cal. Penal Code § 17(b), the conviction now falls under the petty offense exception.