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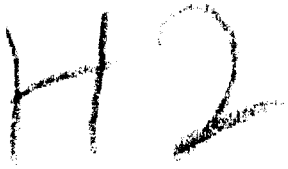
U.S. Citizenship and Immigration Services



FILE: Office: LOS ANGELES DISTRICT OFFICE Date: DEC 03 2004

IN RE:

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

ON BEHALF OF APPLICANT: SELF-REPRESENTED

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the district director will be withdrawn and the case remanded for further consideration.

The record reflects that the applicant is a native and citizen of Mexico. The applicant was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I). The record reflects that the applicant is the wife of a U.S. citizen and has two U.S. daughters. The applicant seeks a waiver of inadmissibility in order to remain in the United States with her family and adjust status to that of a lawful permanent resident.

The district director found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse and denied the application accordingly. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (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 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 carried out.

8 U.S.C. § 1182(a)(2)(A). The Federal Bureau of Investigation (FBI) Record of Arrest and Prosecution ("RAP Sheet") for the applicant reflects a single arrest, on May 18, 1993, by the Anaheim Police Department. Notes on the applicant's adjustment application next to the question regarding prior arrests, apparently written by the adjudicator, consist of a single date, May 18, 1993. A *Request for Evidence* (Form I-72) (RFE) issued by the district office on September 11, 2002, demands arrest and court dispositions for all arrests, and next to this item is written, "1993/05/18 [redacted] A further RFE was issued on March 28, 2003, requesting arrest records for April 19, 1993. A letter of inadmissibility issued to the applicant on May 30, 2003, notifying her of the requirement to file an application for waiver indicates that she was arrested and convicted of "a crime(s)", but does not specify the crimes or dates of arrest. The applicant noted on her application for

waiver, file August 21, 2003, that she was convicted of a single count of petty theft and "[t]herefore, [qualifies for the] petty offense exception" under INA § 1182(a)(2)(A)(ii)(II).

The applicant submitted several documents regarding her criminal record. She submitted a letter indicating that she was convicted of petty theft in violation of California Penal Code § 484-488 and sentenced to "36 months probation, "fine, search & seizure, booked & released." *Letter of Anaheim City Police Department* (October 3, 2002). The police reports attached appear to clarify that she was arrested on April 18, 1993, and sentenced on May 18, 1993. The police reports also contain a detailed description by police of the circumstances surrounding her arrest. She submitted a letter from the Orange County Superior Court which states, "All Misdemeanor records are destroyed 5 years after the final disposition . . .. For any and all information on records that have been destroyed you may contact . . . California Department of Justice Bureau of Criminal Identification." *Letter of Alan Slater, Clerk of the Court, Superior Court of California, County of Orange* (April 3, 2003). The applicant then submitted a letter and computer printout this agency, which contains three records. The first record is dated May 18, 1993, and is associated with the Police Department of Anaheim. In the "Action" column is, "CRT ORDER BOOK, BOOK/RELEASE, 488 PC-PETTY THEFT." *State of California Department of Justice Bureau of Criminal Identification Criminal History Transcript* (May 13, 2003). Under this record is the following advisory:

> The entries provided below are based upon an arrest or court disposition report. The subject of the entry has been identified with this record based upon soft criteria consisting of a name or number match. Positive identification has not been made because fingerprints were not received for the entries. Use of this information is the receivers [sic] responsibility.

Id. Below this advisory are two additional records from 1995. The record dated January 31, 1995, numbered F474467 and apparently associated with the Fullerton, California Police Department (CAPDFULLERTON) contains "NO ARREST RECEIVED 488PC-PETTY THEFT" in the Action column. A subsequent record, dated February 23, 1995, numbered 95NM01402 and apparently associated with the Fullerton Municipal Court (CAMCFULLERTON), reads "488 PC-PETTY THEFT, CONVICTED-PROBATION, MISDEMEANOR, SEN: 036 MONTHS PROBATION, FINE, IMP SEN SS."

Notes in the file indicate that the district director concluded based on these records that the applicant had been convicted of two offenses of petty theft, and determined that she was ineligible for the petty offense exception. All prior records, and the applicant's waiver request, refer to a single arrest. The sole record reflecting 1995 actions on a criminal case was not positively matched to the applicant by fingerprints. The applicant asserted eligibility for the petty offense exception. The district director rejected her assertion of eligibility for this exception; however, even in the denial of the waiver application, the district director apparently never notified the applicant that she was considered to have been convicted of two offenses and was therefore not eligible for the petty offense exception. The evidence is not conclusive as to whether the 1995 entries on the criminal history reflect an additional offense or further proceedings on the 1993 offense; as stated above, the match of these records to the applicant was not based on fingerprints and the FBI had no record of a 1995 arrest on the RAP sheet. The AAO contacted the California Department of Justice and this agency was also unable to conclusively state whether the records related to the same 1993 case or an additional case. The record does not contain any indication that the Fullerton Police Department or local Fullerton court, the apparent sources of the 1995 records, were requested to search their records for the source or sources of these entries.

In light of the serious consequences attendant to the bar to admissibility under INA § 212(a)(2)(A) and the possibility that the applicant may be qualified for the petty offense exception, the AAO will remand this case to the district director in order that the applicant specifically be placed on notice that she was determined to have a record of two offenses, and to provide her an opportunity to respond and/or obtain additional records that may be conclusive as to whether she was convicted of a single crime or two crimes. The AAO expresses no opinion on whether the 1995 entries, on this record alone, pertain to an additional offense by the applicant. If the applicant fails or is unable to obtain further records or other satisfactory response after being given the opportunity to do so, the district director retains the authority to make the inadmissibility determination on the record. The AAO notes that the applicant bears the burden of proving that she is not inadmissible under section 212 of the Act. INA § 291, 8 U.S.C. § 1361.

Inasmuch as the case is remanded for further proceedings on the inadmissibility determination, the AAO does not reach the issue of whether the applicant established extreme hardship to her qualifying relative(s) as required by INA § 212(h), 8 U.S.C. § 1182(h).

ORDER: The decision of the district director is withdrawn, and the case is remanded for further proceedings.