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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

MSC-02-245-61766

Office: LOS ANGELES

Date: FEB 04 2009

IN RE:

Applicant:

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office on your appeal. If your appeal was dismissed or rejected, your file has been sent to the National Benefits Center. You no longer have a case pending before this office. If your appeal was sustained or the matter was remanded for further action, your file has been returned to the office that originally decided your case, and you will be contacted. You are not entitled to file a motion to reopen or reconsider your case.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application based on the determination that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because he had been convicted of spousal abuse in California. The director concluded that spousal abuse is a Crime Involving Moral Turpitude (CIMT) thus rendering the applicant ineligible for permanent residence under the terms of the LIFE Act. *Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant is represented by counsel on appeal. Counsel maintains that the applicant's conviction for spousal abuse falls under the petty offense exception to inadmissibility as a conviction for a CIMT under California law. Thus, counsel states that the applicant remains eligible for permanent resident status under the terms of the LIFE Act.

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 temporary 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).

Additionally, an applicant for admissibility who stands convicted of a CIMT may be eligible for the youthful offender exception if: the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States. 8 U.S.C. § 1182(a)(2)(A)(ii)(I). The applicant does not assert that he is eligible for the youthful offender exception and we note that the crime was not committed when the applicant was under 18 years of age.

In this case, the record contains a letter from the California Department of Justice dated November 3, 2003. The documents attached to the letter indicate that on October 17, 1996, the applicant was charged with one count of violating section 273.5 of the California Penal Code – *Spousal Abuse*, and one count of violating section 422 of the California Penal Code – *Threatening Crime with Intent to Terrorize*. The applicant pleaded guilty to spousal abuse and was sentenced to 120 days in jail and 36 months of probation. The conviction documents attached to the November 3, 2003 letter characterize the offense as a misdemeanor. The threat with intent to terrorize charge under section 422 of the California Penal Code was dismissed pursuant to the terms of a plea agreement.

In counsel's brief submitted in support of the Notice of Appeal, (Form I-290B) counsel does not dispute that the applicant's conviction for spousal abuse is a CIMT. Nonetheless, counsel argues that the petty offense exception applies because the statute under which the applicant was convicted allows for both felony and misdemeanor punishments. In that the applicant was convicted under this statute as a misdemeanor and was sentenced to six months in jail, counsel argues that his conviction falls under the petty offense exception for inadmissibility on account of a conviction for a CIMT.

The AAO concludes that the applicant remains ineligible to adjust status to one of permanent residence because his convictions do not fall under the petty offense exception to a conviction for a CIMT. First, the AAO has reviewed the provisions of the statute under which the applicant was convicted, California Penal Code section 273.5. This section provides:

- (a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, 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;
- (b) Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section;
- (c) As used in this section, "traumatic condition" means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.

In this case, the applicant was sentenced to 120 days in jail and three years of probation. Under the terms of the statute listed above, the statutory maximum sentence for spousal abuse ranges between a fine of \$6,000 up to *four years incarceration* or any combination of a monetary fine and some form of imprisonment. Thus, the *statutory maximum* sentence for the crime of spousal abuse under section 273.5 of the California Penal Code may be up to four years of imprisonment, well in excess of the one year incarceration limit needed in order to qualify as a “petty offense.” As noted above, 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.” See *Mendez-Mendez v. Mukasey, supra*. It is irrelevant that the court documents list the offense as a misdemeanor because it is the *statutory maximum sentence* that is relevant for the petty offense exception.

In essence, section 273.5 of the California Penal Code is a “wobbler” statute in that it envisions the application of felony or misdemeanor punishments. We note that the statute, as written, considers spousal abuse to be a felony offense, with varying degrees of punishments dependent upon the factual circumstances of the actual criminal event. Nonetheless, in determining inadmissibility on account of a conviction for a CIMT and the applicability of the petty offense exception, the AAO looks to the statutory maximum sentence and not the possible range of punishments. See *Mendez-Mendez v. Mukasey, supra*.

The record further shows that on February 4, 2000 the court set aside the conviction and dismissed the case under the provisions of section 1203.4 of the California Penal Code. The Board of Immigration Appeals, in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), held that under the statutory definition of “conviction” provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Therefore, the applicant remains convicted, for immigration purposes, of the felony offense despite the dismissal of the conviction.

The AAO concludes that the applicant is ineligible for permanent resident status pursuant to the terms of the LIFE Act, as he cannot establish that he is otherwise admissible to the United States on account of his conviction for a CIMT.¹

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.

¹ Congress has provided no waiver for a CIMT as a ground of inadmissibility.