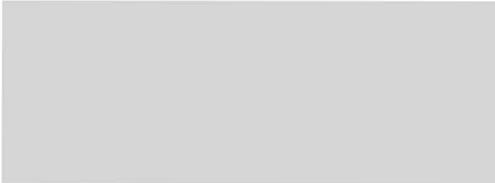




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 23 2015**

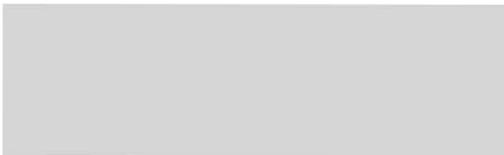
FILE #: [REDACTED]

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]

PETITION: Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will remain denied.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

Applicable Law

Section 101(a)(15)(U)(i) of the Act provides for U nonimmigrant classification to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion.

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

(2) 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.

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

- (i) In General.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

Facts and Procedural History

The petitioner is a native and citizen of Mexico who claims to have entered the United States in April 1989 without admission, inspection or parole. The petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status as well as a Form I-192, Application for Advance Permission to Enter as a Nonimmigrant on September 25, 2012. On October 10, 2013, the director issued a Request for Evidence (RFE) noting that the petitioner was inadmissible to the United States under section 212(a)(6)(A)(i) (present without admission or parole) of the Act, and requested that the petitioner submit a statement and any relevant supporting evidence to address whether the director should favorably exercise discretion to approve the Form I-192. On January 16, 2014, the petitioner responded with additional evidence. On May 14, 2014, the director issued a second RFE requesting additional evidence from the petitioner regarding two criminal charges that were revealed pursuant to a criminal history check. On July 21, 2014, the petitioner responded with additional evidence regarding the charges.

On December 5, 2014, the director found the petitioner's response insufficient to waive the grounds of inadmissibility and denied the Form I-192. The director determined that the petitioner was inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole) and 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude (CIMT)) of the Act. In particular, the director found that the petitioner was convicted of Corporal Injury to Spouse/Cohabitant, in violation of California Penal Code (CPC) section 273.5(a) and sentenced to 36 months in jail, 36 months probation and a 52-week batterer program. The director found that such a criminal violation is extremely serious and amounts to both a CIMT and an aggravated felony. The director also noted that the petitioner was arrested on [REDACTED] 2005 for Driving Under the Influence and in [REDACTED] 2005 for a probation violation and held that the petitioner is a risk to society and the petitioner's criminal history is very serious. The director denied the petitioner's Form I-918 petition on the same day. Although the director determined that the petitioner was statutorily eligible for U nonimmigrant status, the director denied the Form I-918 petition because the petitioner was inadmissible to the United States on the basis of the denial of the Form I-192 application. The petitioner appealed the denial of the Form I-918 petition.

On appeal, the petitioner does not dispute that he is inadmissible to the United States under section 212(a)(6)(A)(i) of the Act but claims that he has not been convicted of a CIMT under section 212(a)(2)(A)(i)(I) of the Act or an aggravated felony.¹ Although the petitioner does not contest that he is inadmissible under section 212(a)(6)(A)(i) of the Act, and we do not have jurisdiction to review whether the director properly denied the Form I-192, we will review whether the director erred in determining that the petitioner has been convicted of a CIMT as the petitioner asserts that this incorrect inadmissibility determination greatly affected the outcome of his Form I-192 waiver application.²

¹ An aggravated felony is not a ground of inadmissibility under section 212(a)(2) of the Act but the director did not use the characterization of the criminal violation as a ground of inadmissibility; rather, the director used the characterization to, among other factors, find that the petitioner did not warrant a favorable exercise of discretion.

² We note, however, that the director may consider any negative factors or convictions that are present in the petitioner's case, even if they do not reach the level of a crime involving moral turpitude or a separate ground of inadmissibility, to determine whether a waiver would be in the public or national interest. See Section 212(d)(14) of the Act.

Analysis

We conduct appellate review on a *de novo* basis. A full review of the record supports the director's determination that the petitioner is inadmissible under section 212(a)(6)(A)(i) (present without admission or parole) of the Act but not the director's determination that the petitioner is inadmissible under section 212(a)(2)(A)(i)(I) (conviction of a CIMT) of the Act. All nonimmigrants must establish their admissibility to the United States or show that any grounds of inadmissibility have been waived. 8 C.F.R. § 214.1(a)(3)(i). For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 in conjunction with a Form I-918 petition in order to waive any applicable grounds of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: "There is no appeal of a decision to deny a waiver." As we do not have jurisdiction to review whether the director properly denied the Form I-192, we do not consider whether approval of the Form I-192 should have been granted. The only issue before us is whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

The petitioner does not dispute that he is present in the United States without admission or parole but argues that the conviction under CPC § 273.5(a) is not a CIMT, due a claimed application of the "petty offense exception" under section 212(a)(2)(A)(ii)(II) of the Act. To qualify for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act, the petitioner must have committed only one CIMT, the maximum penalty possible for that crime must not exceed imprisonment for one year and, if he was convicted of such crime, he must not have been sentenced to a term of imprisonment in excess of six months.

The record shows that, on [REDACTED] 2000, the petitioner was arrested for spousal battery and subsequently convicted of inflicting corporal injury on a spouse/cohabitant, in violation of CPC § 273.5(a).³ Courts have held that a conviction under CPC § 273.5(a) is not categorically a crime involving moral turpitude, but that CPC § 273.5(a) is a divisible statute for which some subsections would qualify as a CIMT and others would not. See *Cervantes v. Holder*, 772 F.3d 583, 588 (9th Cir. 2014); *Morales–Garcia v. Holder*, 567 F.3d 1058, 1065 (9th Cir. 2009); see also *Grageda v. INS*, 12 F.3d 919, 922 (9th Cir.1993). Here, the record of conviction shows that the petitioner assaulted his wife, a person of whom he is in a special or familial relationship with, and, therefore, his conviction is for a crime involving moral turpitude. See *Morales–Garcia v. Holder*, 567 F.3d at 1065; *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996).

The director relied on the evidence submitted by the petitioner, specifically the docket sheets from the Superior Court of California in [REDACTED], which clearly indicate that, on [REDACTED] 2001, the petitioner was "[s]entenced to serve 36 months in Jail, all but 1 day suspended, 1 day credit for time served." The same docket sheets reveal that, on [REDACTED] 2000, the prosecutor offered the petitioner a 90-day maximum jail term and, pursuant to that offer, the petitioner plead guilty to a violation of CPC § 273.5(a) on the same day. CPC § 273.5(a) is a so-called "wobbler offense" that is punishable as either a felony or a misdemeanor. See *Ewing v. California*, 538 U.S. 11, 16–17, 123 S.Ct. 1179, 155 L.Ed.2d 108

³ Under California law, "[a]ny person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b) [describing different familial, domestic, or cohabitating relationships] 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" Cal. Penal Code § 273.5(a) (West 2015).

(2003) (describing “wobblers”). If the conviction is a felony, then the “state prison” provision applies and the maximum penalty is four years in state prison. *Ceron v. Holder*, 712 F.3d 426, 430; CPC § 17(a). But, if the conviction is a misdemeanor, then the “county jail” provision applies and the maximum penalty is one year in county jail. *Ceron*, 712 F.3d at 430; CPC § 17(a). A wobbler offense is classified as a misdemeanor “for all purposes . . . [a]fter a judgment imposing a punishment other than imprisonment in the state prison.” CPC § 17(b)(1)(2015). Under California law, specifically CPC § 19.2 (2015), “[i]n no case shall any person sentenced to confinement in a county or city jail . . . on conviction of a misdemeanor . . . or for any reason except upon conviction of more than one offense when consecutive sentences have been imposed, be committed for a period in excess of one year.” On that basis, the petitioner’s offense was clearly a misdemeanor in that the maximum sentence could not have exceeded one year of imprisonment and, accordingly, the petitioner qualifies for the petty offense exception.

We withdraw the director’s conclusion that the petitioner is inadmissible as someone who has been convicted of a CIMT. However, as noted above, the director correctly determined, and the petitioner did not challenge either in the Form I-192 or on appeal, that he was inadmissible under section 212(a)(6)(A)(i) of the Act. We have no jurisdiction to review the discretionary denial of a Form I-192 submitted in connection with a Form I-918 U petition. *See* 8 C.F.R. § 212.17(b)(3). As such, the petitioner is inadmissible under section 212(a)(6)(A)(i) of the Act.

Conclusion

In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Although the petitioner has met the statutory eligibility requirements for U nonimmigrant classification, he has not established that he is admissible to the United States or that his grounds of inadmissibility have been waived. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act, pursuant to 8 C.F.R. § 214.1(a)(3)(i).

ORDER: The appeal is dismissed. The petition remains denied.