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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: PHOENIX Date: MAR 17 2009

IN RE: [redacted]

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:

[redacted]

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application declared moot. The matter will be returned to the district director for continued processing.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to 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 is married to a lawful permanent resident and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with her husband and children in the United States.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated December 12, 2006.

On appeal, counsel contends that the applicant's conviction qualifies under the petty offense exception and, therefore, the applicant does not need a waiver of inadmissibility.

The record contains, *inter alia*: a copy of a Certified Abstract of Marriage indicating that the applicant and her husband, [redacted], were married on December 24, 1993; copies of the couple's children's birth certificates; copies of the couple's tax returns; conviction documents; and an approved Immigrant Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this 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 6 months (regardless of the extent to which the sentence was ultimately executed).

In the instant case, the record shows that the applicant entered the United States in May 1988 without inspection. The record further indicates that on October 12, 1995, the applicant was convicted of committing welfare fraud in violation of California Welfare and Institutions Code § 10980(c)(2). She was fined $200, ordered to perform community service, and placed on probation for five years.[1]

California Welfare and Institutions Code § 10980(c)(2) states:

> (c) Whenever any person has, willfully and knowingly, with the intent to deceive, by means of false statement or representation, or by failing to disclose a material fact, or by impersonation or other fraudulent device, obtained or retained aid under the provisions of this division for himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished as follows:
>
> ....
>
> (2) If the total amount of the aid obtained or retained is more than four hundred dollars ($400), by imprisonment in the state prison for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars ($5,000), or by both imprisonment and fine; or by imprisonment in the county jail for a period of not more than one year, by a fine of not more than one thousand dollars ($1,000), or by both imprisonment and fine.

Significantly, a conviction under § 10980 can be either a misdemeanor or a felony. *Compare* CAL.WELF. & INST.CODE § 10980(a) (misdemeanor) *with* § 10980(b) (felony). In *Garcia-Lopez v. Ashcroft*, the Ninth Circuit Court of Appeals held that a conviction under a "wobbler" statute must be treated as a misdemeanor and not a felony if the punishment imposed does not involve imprisonment in the state prison. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844-45 (9th Cir. 2003). In that case, the Court concluded that Garcia-Lopez's misdemeanor conviction qualified him for the petty offense exception. *Id.* (citing CAL. PENAL CODE § 17(b)(1)). The Court found that "the penalty for the offense did not exceed imprisonment for one year, and because Garcia-Lopez received an actual sentence of less than six months, Garcia-Lopez qualified for the petty offense exception." *Id.* at 846.

In the instant case, imprisonment for a violation of California Welfare and Institutions Code § 10980(c)(2) may or may not exceed one year and the applicant did not receive imprisonment at all. Therefore, the AAO finds counsel's assertions to be convincing that the applicant qualified for the petty offense exception. The AAO thus concludes that counsel has

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[1] The record also shows that the applicant was arrested on December 3, 1989, and charged with petty theft. However, there is no evidence in the record showing the disposition of this charge.

established that the applicant was convicted of only one crime, that the crime qualifies under the petty offense exception to inadmissibility under section 212(a)(2)(A) of the Act, and that the applicant is not otherwise inadmissible. As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act is moot and will not be addressed. Accordingly, the appeal will be dismissed, the prior decision of the district director is withdrawn, and the instant application for a waiver is declared moot.

ORDER: The appeal is dismissed, the prior decision of the district director is withdrawn, and the instant application for a waiver is declared moot. The district director shall continue processing the adjustment application (Form I-485) accordingly.