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



U.S. Citizenship and Immigration Services

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[Redacted]

FILE:

[Redacted]

Office: PHOENIX, ARIZONA

Date: FEB 18 2010

IN RE:

Applicant:

[Redacted]

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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant, [REDACTED], 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 theft, a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated May 30, 2007.

On appeal, counsel states that the Superior Court of Arizona's designation of the applicant's criminal conviction from a class six undesignated felony to a class one misdemeanor qualifies his offense for the petty offense exception.

The AAO will first address the finding of inadmissibility.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(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-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(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).

The record reflects that ██████ pled guilty to the charge of theft and criminal damage, both class six undesignated felonies, in the Superior Court of the State of Arizona, Maricopa County, on January 10, 2007. There is no document in the record showing the sentence imposed by the trial court for the convictions.

Counsel does not dispute the finding that ██████ theft conviction involves moral turpitude. However, counsel asserts that the designation of ██████ criminal conviction from a class six undesignated felony, which has a maximum term of imprisonment of one and one-half years, to a class one misdemeanor qualifies his offense for the petty offense exception.

██████ was convicted of a class six felony. A class six felony is considered an “open” offense because the trial court is conferred discretion, by the terms of Arizona Revised Statutes § 13-702(G),¹ in determining the appropriate point at which to classify the offense as a class six felony or a class one misdemeanor. *State v. Shlionsky*, 184 Ariz. 631, 632, 911 P.2d 637, 638 (App. 1996). Here, the record shows that the trial court placed ██████ on probation for a class six felony and designated his offense as a misdemeanor after the probation terminated. Arizona Revised Statutes § 13-707 states that the maximum term of imprisonment for a class one misdemeanor is six months.

With regard to a sentence modification, in *In re Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), the Board of Immigration Appeals gave for immigration purposes “full and faith and credit to the decision of California Superior Court modifying the respondent's sentence, nunc pro tunc, from 365 days to 240 days,” even though the modification was not to correct any substantive or procedural defect in the original judgment.

In view of the holding in *Cota-Vargas*, the AAO will give full faith and credit to the trial court’s designation of ██████ offense as a misdemeanor rather than a class six undesignated felony.

¹ Arizona Revised Statutes § 13-702(G) acts as a sentence-reducing or sentence-enhancing statute, and it provides that:

Notwithstanding any other provision of this title, if a person is convicted of any class 6 felony . . . and if the court . . . is of the opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly or may place the defendant on probation in accordance with chapter 9 of this title and refrain from designating the offense as a felony or misdemeanor until the probation is terminated. The offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor. . . .

The petty offense exception requires that 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).” Although [REDACTED] did not submit his criminal record reflecting the sentence imposed for his theft conviction, the Order of Discharge From Probation signed by the judge on March 5, 2009, conveys that [REDACTED] started his probation period on March 14, 2007. [REDACTED] sentencing, according to the Maricopa County Adult Probation Department Change of Plea, was to be held on February 14, 2007. This evidence indicates that [REDACTED] would have served only 30 days of imprisonment, had it been so ordered by the judge; and the designation of [REDACTED] theft conviction to a class one misdemeanor, which under Arizona Revised Statutes section 13-1802 has the maximum penalty of a six-month jail term, qualifies his offense for the petty offense exception.

In *Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 595 (BIA 2003), the BIA held that a respondent who was convicted of more than one crime, only one of which was a crime involving moral turpitude, was eligible for the petty offense exception provided for under section 212(a)(2)(A)(ii) of the Act. The BIA reasoned that:

The “only one crime” proviso, taken in context, is subject to two principal interpretations: (1) that it is triggered . . . by the commission of any other crime, including a mere infraction; or (2) that it is triggered only by the commission of another crime involving moral turpitude [W]e construe the “only one crime” proviso as referring to . . . only one crime involving moral turpitude.

23 I&N Dec. at 594.

As the applicant has been found to have been convicted of only one crime involving moral turpitude he is eligible for the petty offense exception and the crime qualifies under the petty offense exception to inadmissibility.

The record also indicates that the applicant is not inadmissible under Section 212(a)(2)(B) of the Act for having multiple criminal convictions.

Section 212(a)(2)(B) of the Act state in pertinent part:

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

The record suggests that if the judge had ordered confinement, the aggregate sentence for [REDACTED] two convictions would have been no more than 30 days. Thus, he is not inadmissible under section 212(a)(2)(B) of the Act. Accordingly, the AAO finds that the record does not establish that the applicant is inadmissible to the United States.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8

U.S.C. § 1361. Here, the applicant has met that burden. The May 30, 2007 decision of the district director will be withdrawn and the appeal will be dismissed as the underlying waiver application is moot.

ORDER: The appeal is dismissed as the underlying waiver application is moot. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.