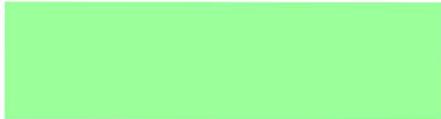


(b)(6)

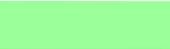
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

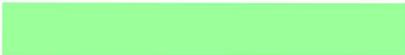


U.S. Citizenship
and Immigration
Services



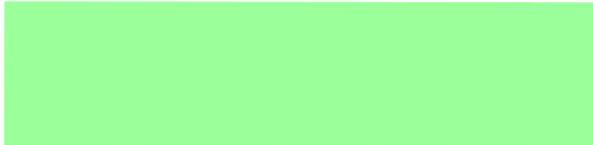
DATE: **OCT 06 2014** Office: VERMONT SERVICE CENTER

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 244(c)(2)(A)(ii) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1254(c)(2)(A)(ii)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,


for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the service center director will be withdrawn and the application declared unnecessary.

The applicant is a native and citizen of El Salvador applying for re-registration of Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254. The director determined that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime that violated controlled substance laws and is ineligible for TPS under section 244(c)(2)(B)(i) of the Act for having been convicted of two misdemeanors in the United States. The director determined that the Application for Waiver of Ground of Inadmissibility (Form I-601) does not overcome the grounds of ineligibility for TPS and the waiver application was denied accordingly. See *Decision of the Director*, March 14, 2012.

On appeal counsel for the applicant asserts that the applicant has only one misdemeanor conviction, but does not have two misdemeanor convictions. Counsel contends that under California Proposition 36 the applicant was allowed to receive substance abuse treatment in lieu of incarceration for a first and second time, nonviolent, simple drug possession, and as this was the applicant's first offense, the charges were dismissed under California Penal Code section 1210(e)(1). Counsel states that under *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the Ninth Circuit Court of Appeals held that the Federal First Offender Statute's ameliorative provisions apply to an alien seeking relief and should not count as a conviction, and states that California Penal Code section 1210.1(e)(1) is akin to the Federal First Offender Statute.

On appeal counsel submits a brief. The entire record was reviewed and considered in rendering this decision.

Section 244(c)(2)(A) of the Act provides, in pertinent part:

(A) Waiver of certain grounds for inadmissibility.-In the determination of an alien's admissibility for purposes of subparagraph (A)(iii) of paragraph (1)-

....

(ii) except as provided in clause (iii), the Attorney General may waive any other provision of section 212(a) in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest; but

(iii) the Attorney General may not waive-

(I) paragraphs (2)(A) and (2)(B) (relating to criminals) of such section . . .

Section 244(c)(2)(B) of the Act provides:

(B) Aliens ineligible. - An alien shall not be eligible for temporary protected status under this section if the Attorney General finds that-

(i) the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States

“Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

“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 the term "felony" of this section. 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. § 244.1.

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) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), 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 Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

The record reflects that the applicant was convicted in 2008 for Inflicting Corporal Injury on Spouse/Cohabitant in violation of California Penal Code (CPC) section 273.5(a) and sentenced to 60 days imprisonment, 36 months of probation, and fines, and ordered to successfully complete a 52-week domestic violence treatment program and attend 26 alcoholics anonymous meetings. The director found the applicant to have been convicted of a misdemeanor, which counsel has not contested.

At the time of the applicant's conviction, California Penal Code section 273.5 stated:

(a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person with whom he or she is cohabiting, or any person who willfully inflicts upon any person who is 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.

In *Morales-Garcia v. Holder*, 567 F.3d 1058, 1063-67 (9th Cir. 2009), the Ninth Circuit Court of Appeals found that all offenses under CPC section 273.5 are not categorically crimes involving

moral turpitude. Specifically, the Ninth Circuit found that CPC section 273.5 reaches acts against individuals with a broad range of relationships to the perpetrator, some of which “are more akin to ‘strangers or acquaintances, which . . . [does] not necessarily [trigger] a crime involving moral turpitude.’” *Morales-Garcia v. Holder*, 567 F.3d at 1063-67 (quoting *Grageda v. INS*, 12 F.3d 919, 922 (9th Cir. 1993)). Thus, the Ninth Circuit determined that a modified categorical inquiry is required to determine if an offense under CPC section 273.5 constitutes a crime involving moral turpitude. In the present case the record does not establish whether the victim was a spouse, cohabitant, or mother of his child.

Even if the applicant’s conviction under CPC section 273.5 were a crime involving moral turpitude, it would qualify for the petty offense exception, as the crime for which he was convicted did not carry a maximum penalty of more than one year and applicant was sentenced to less than six months. Because the offense can result in a range of punishments, it is referred to as a “wobbler” statute, providing for either a misdemeanor or a felony conviction. *See Ceron v. Holder*, 730 F.3d 1133 (9th Cir. 2013); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003). We note that the court documents submitted to the record indicate that the applicant was convicted of a misdemeanor under CPC section 273.5(a) and sentenced to 60 days imprisonment, 36 months of probation, and fines, and ordered to successfully complete a 52-week domestic violence treatment program and attend 26 alcoholics anonymous meetings. We note that the Ninth Circuit Court of Appeals found that the state court’s designation of an offense as either a misdemeanor or a felony was binding on the Board of Immigration Appeals. *Garcia-Lopez v. Ashcroft*, *supra*. Thus, the applicant’s conviction is for a misdemeanor, which carries a maximum sentence of one year in a county jail. *See also Mendez-Mendez v. Mukasey*, 525 F.3d 828 (9th Cir. 2008).

The record also reflects that in 2001 the applicant was arrested by the [REDACTED] Police Department Narcotics Division and charged with Possession of Controlled Substance under Health and Safety Code Section 11350-11356.5.

The record reflects that on December 4, 2001, the applicant entered a plea of guilty and was placed on deferred entry of judgment for a period of 24 months. On April 4, 2002, the applicant’s deferred judgment was terminated, probation revoked, and proceedings reinstated with a disposition of convicted. On October 22, 2008, the applicant was again placed on probation for a period of three years. On April 7, 2009, the applicant’s probation was again revoked and disposition again entered as convicted. On April 28, 2009, the applicant’s probation was continued with a notation that Proposition 36 program was reinstated. On August 7, 2009, the court disposition was that the Proposition 36 program was terminated and the applicant’s plea set aside / dismissed per 1210.1 P.C.

California Penal Code section 1210.1(e)(1), states:

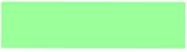
At any time after completion of drug treatment and the terms of probation, the court shall conduct a hearing, and if the court finds that the defendant successfully completed drug treatment, and substantially complied with the

conditions of probation, including refraining from the use of drugs after the completion of treatment, the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment, complaint, or information against the defendant. In addition, except as provided in paragraphs (2) and (3), both the arrest and the conviction shall be deemed never to have occurred. The defendant may additionally petition the court for a dismissal of charges at any time after completion of the prescribed course of drug treatment. Except as provided in paragraph (2) or (3), the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted.

On appeal counsel asserts that as the charges against the applicant were dismissed under CPC section 1210.1(e)(1), the offense is not a conviction for immigration purposes, the applicant has not been convicted of two misdemeanor offenses, and he is not subject to a bar to TPS. Counsel states that under Proposition 36, a defendant is allowed to receive substance abuse treatment in lieu of incarceration for first and second time, nonviolent, simple drug possession. Counsel asserts that in *Lujan-Armendariz v. INS* the U.S. Court of Appeals for the Ninth Circuit held that a first time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act. Counsel states that although the decision was reversed in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc), the decision in *Nunez-Reyes* applies prospectively, only to convictions on or after the July 14, 2011, and therefore *Lujan-Armendariz* is applicable in the present case.

We concur with counsel's assertion that the applicant does not have two misdemeanor convictions rendering him ineligible for TPS. We note that the Ninth Circuit Court of Appeals previously held that an alien whose controlled substance offense would have qualified for treatment under the Federal First Offender Act (FFOA), but who was convicted and had his or her conviction expunged under state or foreign law, does not have a conviction for immigration purposes. See *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). In order to qualify for treatment under the FFOA, the defendant must have been found guilty of an offense described in section 404 of the Controlled Substances Act (CSA), 21 U.S.C. § 844; have not been convicted of violating a federal or state law relating to controlled substances prior to the commission of such an offense; and have not previously been accorded first offender treatment under any law. See 18 U.S.C. § 3607(a); *Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000). Section 404 of the CSA provides that it is "unlawful for any person knowingly or intentionally to possess a controlled substance . . ." 21 U.S.C. § 844(a). We note that although *Lujan-Armendariz v. INS* was overruled in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc), the ruling in *Nunez-Reyes* applies only prospectively to convictions occurring after July 14, 2011. *Id.* at 687.

In this case we find that the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime that violated controlled substance laws. We further find that although it is not clear from the record whether the applicant's conviction for inflicting corporal injury on a spouse/ cohabitant is a crime involving moral turpitude, he qualifies for the



petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act, as the maximum penalty possible for his conviction is one year imprisonment and he was sentenced to less than six months in prison. Further, as he has been convicted of only one misdemeanor, he is not ineligible for temporary protected status under Section 244(c)(2)(B)(i) for having been convicted of any felony or two or more misdemeanors committed in the United States.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, as the applicant is not inadmissible and is eligible to apply for temporary protected status, that burden has been met.

ORDER: The appeal is dismissed and the previous decision of the service center director is withdrawn, as the waiver application is unnecessary.