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U.S. Citizenship
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FILE: Office: MIAMI, FLORIDA Date: DEC 15 2008

IN RE: [Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 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.

A handwritten signature in black ink that reads "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida, 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 Cuba who was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i), for committing a crime involving moral turpitude. The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the district director denied, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the District Director*, dated June 30, 2006.

The AAO will first address the finding of inadmissibility.

Section 212(a)(2) of the Act states that:

(A)(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.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The record reflects that on April 16, 1997 in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, case number [REDACTED] the applicant pled nolo contendere to four counts:

- counts 1 and 4: aggravated assault with deadly weapon;
- count 2: burglary with assault therein; and
- count 3: aggravated battery.

A judge ordered a concurrent sentence for all counts, to serve 365 days in prison and three years of probation, and to pay charges and costs. The district director was correct in finding the applicant

inadmissible under section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), for committing a crime involving moral turpitude.

On appeal, counsel states that the applicant's aforementioned convictions were vacated and set aside on constitutional grounds on January 31, 2008. Counsel contends that in light of *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000), because the applicant's convictions were vacated on constitutional grounds, and consequently are no longer treated as convictions, he is no longer inadmissible under section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i).

The general rule is that a conviction vacated on legal merits is no longer a conviction for immigration purposes. *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. 2006). Furthermore, in *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000), the case referenced by counsel, the Board of Immigration Appeals (BIA) held that a conviction vacated pursuant to Article 440 of the New York Criminal Procedure Law does not constitute a conviction for immigration purposes within the meaning of section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A) (Supp. IV 1998). The BIA reached this conclusion because the New York criminal law provision under which the respondent's conviction was vacated was neither an expungement statute nor a rehabilitative statute. The BIA had not agreed with the Immigration and Naturalization Service's contention, which was that, because the conviction was vacated for purposes of avoiding removal, and not for reasons relating to a constitutional or legal defect in the criminal proceedings, the respondent's conviction remains a "conviction" under the Act.

Here, the order of the judge states that it is "ordered and adjudged that the plea and judgment entered herein is hereby vacated and set aside on constitutional grounds." Because the court vacated the convictions (for case number [REDACTED]) based on constitutional grounds, and not for reasons unrelated to the merits of the underlying criminal proceedings, the AAO finds that the applicant no longer has convictions within the meaning of section 101(a)(48)(A) of the Act, and is therefore not inadmissible under section 212(a)(2) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

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.