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U.S. Citizenship and Immigration Services

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DEC 29 2004

FILE: [redacted] Office: SEATTLE Date:

IN RE: [redacted]

PETITION: Application for Waiver of Grounds of Inadmissibility under Sections 212(h) and 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and 1182(a)(9)(B)

ON BEHALF OF PETITIONER:

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Seattle, Washington, and is now before the Administrative Appeals Office (AAO), on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 the spouse of a United States citizen and the parent of two United States citizen children, and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that she may reside in the United States with her husband and children.

The District Director concluded that the applicant had failed to establish that she was eligible for a waiver of inadmissibility, finding that the hardship factors raised in the application did not rise to the level of extreme hardship. Accordingly, the applicant's request for a waiver was denied. *See Decision of the Interim District Director*, dated October 6, 2003.

On appeal, counsel has submitted the Notice of Appeal (Form I-290B), which contains a brief paragraph in support of the appeal asserting that the waiver request is based upon a "faulty conviction record from Yakima District Court (Union Gap division) dated 3/9/93." The Form I-290B further states that the applicant "did not admit to this or any offense during Service interview in Spokane and reliance upon same violates due process of law in this case." While somewhat unclear, the essence of counsel's argument is that the applicant did not "voluntarily, knowingly and intelligently plead guilty to shoplifting" due to the fact that she was "coerced into signing English language conviction documents by the court interpreter against her will." *See Form I-290B*, dated October 22, 2003. Counsel's original submission was supplemented on June 2, 2004, by another copy of the same Form I-290B which simply contains a notation at the bottom signed by counsel which reads as follows: "May 14, 2004: Enclosed please find court order signed today for additional evidence for AAU as set forth above." The submission is a certified copy of a court order dated May 7, 2004 signed by Judge [redacted] of the Yakima District Court, entitled, "Order Withdrawing Plea and Restoring Presumption of Innocence." The submission was not accompanied by any brief or explanatory statement from counsel. Nevertheless, the AAO presumes that counsel is arguing that the effect of the order is to nullify the applicant's conviction, making it ineffective for immigration purposes, and consequently making a waiver of inadmissibility unnecessary.[1]

Before addressing the merits of counsel's specific arguments on appeal, the AAO will briefly review the applicant's immigration and criminal history. The record reflects that the applicant is forty-two-year-old native and citizen of Mexico who appears to have resided in United States since approximately 1990. The applicant is married to a U.S. citizen and is the mother of five children, two of whom are U.S. citizens. The U.S. citizen children are approximately eight and five years of age. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed March 29, 2001. She submitted an Application for Adjustment of Status (Form I-485) on June 21, 2002. The record reflects that the applicant has been convicted of theft offense on two separate occasions. The first conviction, for third degree theft, occurred on June 19, 1992, in Wenatchee, Washington. The applicant was again convicted of a third degree theft offense

[1] The waiver would be unnecessary as the applicant, while still having a second shoplifting conviction, would fall within the exception contained in subsection 212(a)(2)((A)(ii) of the Act, which applies to individuals who have committed only one CIMT which meets the stated criteria

on March 9, 1993, in Union Gap, Washington.[2] The primary evidence establishing the convictions consists of an FBI criminal history report obtained in connection with the applicant's adjustment of status application.

The District Director's denial of a waiver of inadmissibility for the theft convictions gives rise to the case before the AAO. Counsel's principal contention on appeal appears to be that in making its determination, Citizenship and Immigration Service (CIS), may not rely upon the applicant's conviction dated March 9, 1993, because that conviction was entered on the basis of a plea that was not freely and voluntarily given, due to alleged coercion on the part of the court interpreter. *See Notice of Appeal (Form I-290B),* dated October 22, 2003. Unfortunately, counsel's contention is not supported by a brief or any statement of authority in support of this assertion. However, counsel did submit a certified copy of a court order dated May 7, 2004. That order provides that following a hearing before the court on the defendant's motion to withdraw the plea previously made on March 9, 1993, relating to the shoplifting offense, the court granted the requested relief and ordered that the plea be withdrawn and her presumption of innocence is restored. *See Order of the Yakima District Court*, dated May 7, 2004. Counsel appears to contend that the court's order operates to negate the applicant's inadmissibility for the commission of a crime involving moral turpitude, and as such, nullifies the need for a waiver under section 212(h) of the Act. However, the AAO, on the state of the present record, is unable to agree with counsel's assertion either as to the status of the applicant's 1993 shoplifting conviction, or as to her need for waiver, because the evidence and arguments presented on appeal are insufficient.

The AAO turns first to the effect of the Yakima District Court's order regarding the applicant's March 9, 1993, shoplifting conviction. First, although the AAO agrees that the court order provides that the original plea is withdrawn, the AAO finds that there is insufficient evidence to conclude that the applicant's conviction does not survive for immigration purposes. Before addressing the specific issues with the District Court's order, the AAO believes it is useful to review recent immigration case law addressing post conviction remedies and their effect on immigration proceedings.

The case law regarding the effect of post-conviction remedies and their effect on an individual's immigration status has developed considerably in recent years. The Board of Immigration Appeals (BIA) in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), determined that notwithstanding the grant of an expungement, an alien's conviction still exists for immigration purposes. *Matter of Roldan,* involved an alien who had had his guilty plea vacated pursuant to section 10-2604(1) of the Idaho code, a state rehabilitative statute. The BIA rejected the alien's argument that he no longer stood convicted of a crime for immigration purposes and was therefore not removable, holding that, "[s]tate rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Matter of Roldan,* at p.528.

The BIA has sought to clarify and further expand on this holding in subsequent cases involving post-conviction relief orders obtained by aliens subject to removal proceedings. In its most recent published

[2] In addition to the two theft convictions, the record reflects that the applicant has been convicted on two occasions for leaving a child unattended in a vehicle. Those convictions occurred on March 15, 1994, and on November 13, 2001. While those convictions may have a bearing on the applicant's eligibility for relief as a matter of discretion, it is the theft offenses, and not these offenses that give rise to the applicant's need for a waiver of grounds of inadmissibility pursuant to section 212(i) of the Act.

decision on the issue, the BIA, in *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003), clarified that it was drawing a distinction between state court actions to vacate a conviction where the reasons were solely related to rehabilitation or to ameliorate immigration hardships, as opposed to state court actions based upon having found procedural or substantive defects in the underlying criminal proceedings. The BIA found that where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Matter of* at p.624. The BIA further noted that although it would normally examine the law pursuant to which the order was issued, the record in case did not reference the law under which the conviction was vacated. However, an examination of the language of the order and the alien's request for post-conviction relief indicated that neither document questioned the integrity of the underlying criminal proceedings or conviction. The BIA observed that the affidavit submitted to the court alleged that the conviction would pose a bar to the alien's ability to obtain permanent residence. Consequently, the BIA determined that it would still consider the alien to have a conviction because the order was issued solely for immigration purposes.

In contrast, the BIA had previously held, in *Matter of* 22 I&N Dec. 1378 (BIA 2000), that a conviction that had been vacated on the merits pursuant to Article 440 of the New York Criminal Procedure Law was not a conviction for immigration purposes. The BIA found that the state law at issue in that case authorized vacation of a conviction based on the merits of the underlying proceedings, and was not an expungement or rehabilitative statute.

In addition to the BIA, a number of federal courts have also address the issue. As noted in *Matter of Pickering*, those decisions have generally adopted the same approach as the BIA, finding that court orders vacating convictions for reasons unrelated to validity of the guilty plea will not be given effect for immigration purposes. *See generally Matter of Pickering at 624-625.* The decisions out of the Ninth Circuit, the circuit under which this case arises, have taken a similar position to the BIA with respect to the affect of convictions dismissed or vacated for ameliorative purposes. *See generally Murillo-Espinoza v. INS*, 261 F.3d 771, 773-74 (9th Cir. 2001); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003); *Bakerian v. INS, 2004 WL 724946* (N.D. Cal. 2004).

The AAO will next apply the principles from these cases to the facts in the instant case. Unfortunately, counsel has not provided the AAO with any information relating to the statute pursuant to which the order of the Yakima District Court was issued. Additionally, a careful examination of the order itself fails to disclose any reference to the statute under which the order was issued. Moreover, although the court's order references a motion filed with the defendant, counsel has not provided a copy of any such motion for the record. The only reference in the court order to the reasons underlying the order are that it was based upon testimony of the applicant and her husband, changes in the law since the case first arose in 1993, and the court's finding that manifest injustice would occur if the order were not granted. *See Order of the Yakima District Court,* dated May 7, 2004.

The difficulty with counsel's argument is that based on the evidence in the record it is not possible for the AAO to determine whether that the court's order was issued for a rehabilitative purpose and/or in order to assist the applicant with her immigration difficulties and allow her to remain the United States, or whether it

was issued to address defects in the conviction itself. The order makes no reference to any defects in the conviction itself, nor does it specifically support counsel's contention as stated in the Form I-290B that the defendant's plea was improperly procured on the basis of the alleged coercion occurring at the time that the applicant's plea was taken. Simply put, counsel has not presented sufficient evidence in support of his contention as to the allegedly defective nature of the conviction. Without such evidence, the AAO will not speculate as to the reasons underlying the court's order, or the authority under which the order was issued. Consequently, the AAO finds that the applicant's evidence does not support counsel's argument on appeal.

Aside from the issue of the effect of the court order, the AAO will also briefly address counsel's additional argument that the record does not support a conclusion that the applicant has been convicted of this offense or any other offense and did not admit to such conviction during her interview in Spokane. The AAO disagrees with counsel's contention and finds that the evidence in the record does, in fact, support a finding that the applicant was convicted of several offenses, including the two shoplifting offenses which are at issue in this appeal. As noted previously, the record contains a copy of an official FBI criminal history for the applicant as prepared by the FBI's Criminal Justice Information Services Division. The record was obtained by CIS in connection with the standard processing of the applicant's I-485 application. The record contains identifying information that corresponds to that listed by the applicant in her Form I-601, and contained in her CIS records. The record clearly sets forth the applicant's two convictions for theft in 1992 and 1993. In addition, the notice of appeal submitted by counsel, likewise contains a certified copy of the docket sheet from the Yakima County District Court, which reflects the applicant's 1993 theft conviction. While the document indicates that the applicant complied with her jail sentence, paid her fine, and complied with other conditions of her sentence, it also demonstrates that she was in fact convicted of the offense that counsel now asserts can not be proven. Additionally, the record contains a copy of the Record of Sworn Statement taken from the applicant on January 28, 2003, in connection with her adjustment of status application. *See Record of Sworn Statement (I-215W),* dated January 28, 2003. The statement reflects that the applicant was asked about her arrests in the United States, and indicated that she had been arrested on two occasions for shoplifting and pled guilty to both offenses resulting in fines and jail time. Consequently, the AAO finds that the evidence clearly establishes that the applicant has been convicted of two shoplifting offenses that make her inadmissible and ineligible to adjust status without the grant of a waiver.

The AAO will turn briefly to the remaining issue, which is whether the evidence supports a finding of extreme hardship. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999) provides a list of factors the BIA deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Turning to the evidence, the AAO finds that the record reflects almost a complete absence of evidence in support of the waiver. The only evidence contained in the record is a statement from the applicant dated February 7, 2003, in which she expresses remorse for her past actions, as well as her hopes that the waiver will be granted in order that she can obtain permanent resident status. *See Statement of Socorro Ramos,*

dated February 7, 2003. In her statement the applicant expresses concern about the affect her deportation would have upon her children. She indicates that she wishes to remain in the United States with her family in order to support them and address their needs, including the education of her children, whom she asserts are doing well in school. The record contains no additional evidence offered in support of the application, such as statements from the applicant's spouse, any of the children, other family members, or anyone else in a position to assess the affect of the denial of the waiver upon the U.S. citizen spouse or children. Consequently, the AAO reaches the same conclusion as the District Director regarding the issue of extreme hardship, that while the applicant's family members will experience hardship should the waiver be denied, the hardship cannot be considered extreme hardship.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra,* held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. The AAO recognizes that the applicant's husband and children will endure hardship as a result of separation from the applicant should they elect to remain in the United States. However, their situation is typical of individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship. It is further noted that the applicant has various relatives in the United States who would likely provide support for any of the applicant's family members who remain the United States.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.