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

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: MAR 24 2014 Office: VERMONT SERVICE CENTER [redacted]

IN RE: PETITIONER: [redacted]

PETITION: Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:

[redacted]

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

Applicable Law

Section 101(a)(15)(U)(i) of the Act provides for U nonimmigrant classification to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion.

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

> (2) Criminal and Related Grounds
>
> (A) Conviction of Certain Crimes
>
> (i) In General.-Except as provided in clause (ii), any 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, or
>
> * * *
>
> is inadmissible.
>
> * * *
>
> (6) Illegal Entrants and Immigration Violators
>
> (A) Aliens Present Without Permission or Parole
>
> (i) In General.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

* * *

(7) Documentation requirements.-

* * *

(B) Nonimmigrants.-

(i) In general.-Any nonimmigrant who-

(I) Not in possession of a passport valid for a minimum of six months from the date of expiration . . .

* * *

is inadmissible.

Facts and Procedural History

The petitioner is a native and citizen of Mexico who entered the United States on December 1, 1980 without admission, inspection or parole. On August 1, 1990, the petitioner adjusted to lawful permanent resident status. The petitioner filed the instant Form I-918 U petition on September 6, 2012. On March 8, 2013, the director issued a Request for Evidence (RFE) that the petitioner was the victim of a qualifying crime and he noted that the petitioner was inadmissible to the United States. The petitioner responded with additional evidence, including a Form I-192, Application for Advance Permission to Enter as Nonimmigrant (Form I-192). On July 5, 2013, the director found the petitioner's response insufficient to overcome his grounds of inadmissibility and denied the Form I-192. The director determined that the petitioner was inadmissible under sections 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude), 212(a)(6)(A)(i) (present without admission or parole), and 212(a)(7)(B)(i)(I) (not in possession of a valid passport) of the Act. The director denied the petitioner's Form I-918 U petition on the same day. Although the director determined that the petitioner was statutorily eligible for U nonimmigrant status, he denied the Form I-918 U petition because the petitioner was inadmissible to the United States and his Form I-192 had been denied. The petitioner, through counsel, timely appealed the denial of the Form I-918 U petition.

Analysis

All nonimmigrants must establish their admissibility to the United States or show that any grounds of inadmissibility have been waived. 8 C.F.R § 214.1(a)(3)(i). For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 in conjunction with a Form I-918 U petition in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: "There is no appeal of a decision to deny a waiver." As the AAO does not have jurisdiction to review whether the director properly denied the Form I-192, the AAO does not consider whether approval of the Form I-192 should have been granted. The only issue before the AAO is whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

A full review of the record supports the director's determination that the petitioner is inadmissible under section 212(a)(7)(B)(i)(I) (not in possession of a valid passport) of the Act. The petitioner has not submitted evidence that he has a valid passport, nor does he dispute his lack of a valid passport. Accordingly, the petitioner is inadmissible under section 212(a)(7)(B)(i)(I) of the Act.

The director also found the petitioner inadmissible under section 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude) of the Act. The Board of Immigration Appeals (Board) has "observed that moral 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." *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992). Additionally, "moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994). In order to determine whether a conviction involves moral turpitude, the decision-maker must "look first to statute of conviction rather than to the specific facts of the alien's crime." *Matter of Silva-Trevino*, 24 I&N Dec. 687, 688 (A.G. 2008) (overruled in the Ninth Circuit Court of Appeals on other grounds).

The record shows that the petitioner was convicted of being an accessory after the fact in violation of section 32 of the California Penal Code (CPC) by the Orange County, California Superior Court, on April 20, 1999, for which he was sentenced to one year incarceration and three years of probation. An accessory after the fact conviction under Cal. Penal Code § 32 requires a knowing, affirmative act to conceal a felony with the specific intent to hinder or avoid prosecution of the perpetrator. The Ninth Circuit Court of Appeals has held that a conviction under Cal. Penal Code § 32 is not a crime involving moral turpitude if the underlying offense itself was not a crime involving crime moral turpitude. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1071 (9th Cir. 2007) (*en banc*) (overruled in the Ninth Circuit Court of Appeals on other grounds); *see also Matter of Benno Rivens*, 25 I&N Dec. 623 (BIA 2011). In the present case, the underlying offense was murder. It is well established that murder is a crime that is inherently base, vile or depraved, and thus, involves moral turpitude. *See Matter of Lopez*, 13 I&N Dec. 725, 726 (BIA 1971) (explaining, "voluntary manslaughter involves moral turpitude, although involuntary manslaughter does not."). Therefore, since the underlying offense, murder, is a crime involving moral turpitude, the petitioner's conviction for accessory after the fact in violation of section 32 of the California Penal Code is a conviction for a crime involving moral turpitude.

Counsel states that the petitioner's conviction was vacated under Cal. Penal Code § 1203.4. The record establishes that on May 25, 2012, a Superior Court Judge in County of Orange, California, set aside the petitioner's guilty plea pursuant to Cal. Penal Code § 1203.4. In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), the Board of Immigration Appeals (Board) found that there is a distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events such as rehabilitation or immigration hardships. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (holding that a conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes);

Pickering v. Gonzales, 465 F.3d 263 (6th Cir. 2006) (reversing *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)). Thus, 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. *Pickering* at 266.

To establish that his conviction has been vacated for immigration purposes, the petitioner must prove that in vacating his guilty plea, the Superior [redacted], California, acted to correct a procedural or substantive defect in its proceedings. Section 1203.4 of the California Penal Code is a state rehabilitative statute which allows a criminal defendant to withdraw a plea of guilty and enter a plea of not guilty subsequent to successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or substantive defect in the underlying trial court proceedings. In this case, there is no evidence in the record to suggest that the petitioner's motion to vacate judgment was granted on account of an underlying procedural or substantive defect in the merits of the criminal proceedings, and the judgment remains valid for immigration purposes. Therefore, the petitioner's conviction in violation of section 32 of the California Penal Code remains a conviction for a crime involving moral turpitude. Accordingly, the petitioner is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for being convicted of a crime involving moral turpitude.

The director also found the petitioner inadmissible under section 212(a)(6)(A)(i) (present without admission or parole) of the Act. However, the record establishes that the petitioner was admitted to the United States as a lawful permanent resident on August 1, 1990. Lawful permanent resident status terminates upon entry of a final administrative order of removal. 8 C.F.R. § 1.2 (*definition of lawfully admitted for permanent residence*). *See also Etuk v. Slattery*, 936 F.2d 1433, 1447 (2d Cir. 1991) (citing *Matter of Gunaydin*, 18 I&N Dec. 326 (BIA 1982)). Lawful permanent residency does not end upon commission of acts which may render the resident inadmissible or removable, but upon entry of a final administrative order of removability based on such acts. *Matter of Gunaydin*, 18 I&N Dec. at 328. Here, the petitioner remains in removal proceedings before the Immigration Court in San Diego, California, and his next hearing is scheduled for April 8, 2014. Therefore, the petitioner is not inadmissible under section 212(a)(6)(A)(i) of the Act. This portion of the director's decision will be withdrawn.

On appeal, counsel does not contest the petitioner's inadmissibility but instead focuses his assertions on why the director should have favorably exercised his discretion because of the petitioner's extraordinary circumstances and approved the petitioner's Form I-192 waiver request. The director denied the petitioner's application for a waiver of inadmissibility and we have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 U petition. 8 C.F.R. § 212.17(b)(3).

Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Although the petitioner has met the statutory eligibility requirements for U nonimmigrant classification, he has not established that he is admissible to the United States or that his grounds of inadmissibility have been

waived. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act, pursuant to 8 C.F.R. § 214.1(a)(3)(i).

ORDER: The appeal is dismissed. The petition remains denied.