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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES DISTRICT OFFICE Date: AUG 29 2006

IN RE: [redacted]

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

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and an application for waiver is therefore moot.

The applicant, [redacted] a native and citizen of Mexico, was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance. Mr. [redacted] is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. On October 8, 1997, he filed an Application to Adjust Status (Form I-485); he was found ineligible to adjust status to permanent resident on March 19, 2003, for having been unlawfully present in the United States and was instructed at that time to submit his arrest report and court disposition for his 1989 arrest. The applicant filed an Application for Waiver of Ground of Admissibility (Form 1-601) on April 3, 2003, seeking a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his spouse and U.S. citizen children.

The District Director concluded that the applicant was statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act and denied his application accordingly. The AAO notes that the denial of the waiver by the District Director did not address the "unlawful presence" ground of inadmissibility cited as grounds for denial of the adjustment of status application. *See District Director Decision,* dated August 27, 2003. This decision will address both grounds of inadmissibility.

The record reflects that [redacted] plead guilty and was convicted of possession of cocaine on July 6, 1989 in California; he was granted probation for a period of three years. On March 6, 2000, he submitted a motion to the Los Angeles Superior Court to withdraw the plea and vacate the conviction on grounds that he had not been adequately advised of the immigration consequences of his plea, ineffective assistance of counsel and prejudice to the defendant, [redacted] This motion was granted, and the judgment was vacated per section 1385 of the California Penal Code. *See Order Striking Conviction, Withdrawing Plea and Vacating Judgment,* Los Angeles Superior Court, April 27, 2000.

Section 1385 of the California Penal Code states:

> (a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes.
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> . . . .

In response to the District Director's denial of [redacted] application for adjustment of status, counsel for the applicant submitted a letter noting the significance of the judge's order to vacate [redacted] conviction. *Letter from Estela Richeda to Immigration & Naturalization Service, Office of the District Counsel, Los Angeles,* dated July 12, 2000. Counsel noted that the Board of Immigration Appeals (BIA) has ruled that state actions that expunge or otherwise remove a guilty plea or conviction by operation of a state

rehabilitative statute will have no effect in immigration proceedings, citing *Matter of Roldan,* 22 I&N Dec. 512 (BIA 1999). Counsel asserted, however, that Section 1385 of the California Penal Code is not a rehabilitative statute; rehabilitative statutes correct a criminal record if certain conditions exist, including evidence of rehabilitation or fulfillment of conditions of probation; and unlike orders based on such rehabilitative statutes the judge's order to strike [redacted] and vacate judgment did not depend on or look at his record since conviction. [redacted] Instead, the judge referred to the allegations set forth in [redacted] motion as a basis for the order, *i.e.,* that he was not properly advised of the immigration consequences of his plea and did not receive effective assistance of counsel, thus basing the order solely on the circumstances of the proceedings brought against [redacted] and not on rehabilitation. *Id.*

The District Director concluded that [redacted] had been convicted of a crime related to a controlled substance, making him inadmissible to the United States, and that the Act provides for no waiver of the applicant's ground of inadmissibility. *See District Director Decision, supra.* The decision made no reference to the order vacating the judgment.

On appeal, counsel asserts that [redacted] "is not inadmissible under section 212(a) due to the conviction of a criminal offense, or ineligible for any waivers since the criminal conviction has been vacated on non-rehabilitative grounds." *See Brief in Support of Appeal,* September 5, 2003. Counsel adds that [redacted] conviction has been removed from his record for immigration purposes and that the District Director mistakenly determined that he is inadmissible under section 212(a)(2)(i)(II) of the Act. *Id.*

Counsel refers to the Ninth Circuit case, *Murillo-Espinoza v. INS,* 261 F.3d 771 (9th Cir. 2001), to distinguish the situation of [redacted] In *Murillo* the court held that where an Arizona statute provided that a judgment of guilt would be set aside upon fulfillment of the conditions of probation or sentence it remained a conviction for immigration purposes under the BIA's interpretation in *Matter of Roldan.* The BIA in *Matter of Roldan* found that "state 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, supra,* at 528. It is clear, however, that a vacated conviction that is not vacated pursuant to a rehabilitative statute is not a conviction for immigration purposes. *Matter of Rodriguez-Ruiz,* 22 I&N Dec. 1378 (BIA 2000). The vacation of the conviction must be for a procedural or substantive defect in the underlying criminal proceeding and not for reasons related solely to post-conviction events such as rehabilitation or immigration hardship. *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003). Though a guilty plea is a conviction for immigration purposes, some states, including California, where this case arises, require the court to advise defendants of the immigration consequences before a plea, and if they are not advised, the conviction may be vacated. *See Cal. Penal Code §1016.5.* Pleas may also be vacated where counsel is ineffective. *U.S. v. Couto,* 311 F.3d 179 (2d Cir. 2002). In this case, the evidence establishes that the judge's order to vacate [redacted] conviction was not based on rehabilitation, but rather on the allegations set forth in [redacted] motion: he was not properly advised of the immigration consequences of his plea and did not receive effective assistance of counsel. [redacted] conviction on July 6, 1989, which was vacated by the judge, cannot therefore serve as the basis for a finding of inadmissibility.

Though, as noted above, the District Director initially informed [redacted] that he was ineligible for adjustment of status because of unlawful presence in the United States, this ground of inadmissibility was not addressed further by the District Director or [redacted] counsel. The AAO finds, however, that this ground of inadmissibility is also not applicable to [redacted] situation.

Section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
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> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, . . . is inadmissible.
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> > (v) Waiver. – The Attorney General [Secretary] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In this case, [redacted] states that he entered the United States without inspection in 1984. He filed an application for adjustment of status on October 8, 1997. He was issued an advance parole document (Form I-512) on November 10, 1997, which he used to depart and return to the United States. Though there is no indication in the record of his departure date, the record indicates that he returned on February 1, 1998.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay authorized by the Secretary for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* [redacted] thus accrued unlawful presence from April 1, 1997, the day unlawful presence begins to accrue under section 212(a)(9)(B) of the Act, until October 8, 1997, the date of his proper filing of the adjustment application, a period of more than 180 days but less than one year. Pursuant to section 212(a)(9)(B)(i)(I), [redacted] is therefore inadmissible if he seeks admission within three years of the date of his departure. The record indicates that his departure was some time between the issuance of his parole document on November 10, 1997 and his return to the United States on February 1, 1998.

An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). As the final determination on the I-485 application is dependent on the waiver application, which is the subject of this appeal, [redacted] application for admission is still pending. More than three years have passed since his last departure from the United States.

[redacted] is therefore not inadmissible based on his prior unlawful presence as he is not seeking admission (in this case, through his I-485 application) within three years of his departure.

Based on the record, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(i)(II) of the Act due to the conviction of a criminal offense, as his conviction has been vacated. The AAO also finds that the applicant is not inadmissible under section 212(a)(9)(B) of the Act due to unlawful presence, as more than three years have passed since his last departure. He therefore does not require a waiver of inadmissibility, and the appeal will be dismissed as the waiver application is moot.

ORDER: The appeal is dismissed as the waiver application is moot.