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and Immigration
Services

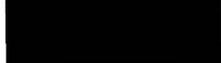
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H12

FILE:



Office: LOS ANGELES (SANTA ANA)

Date: MAY 29 2007

IN RE:



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:



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, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the district director's decision to deny the application. The matter is now before the AAO on motion to reconsider. The motion will be granted, the previous decisions of the district director and the AAO will be withdrawn, and the Form I-601 application will be declared moot.

The applicant is a native and citizen of Colombia who was found to be inadmissible to the United States pursuant to 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 crimes involving moral turpitude. Specifically, the applicant was convicted of three crimes, under: California Penal Code section 484(a) (misdemeanor theft of property); California Penal Code section 472 (misdemeanor forgery or counterfeiting of seals; possession and concealment of counterfeited seal), and; California Penal Code section 476 (misdemeanor forgery; fictitious or altered bills, notes, or checks.) The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her family members.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated July 27, 2004. Upon review, the AAO affirmed the district director's decision. *Decision of the Administrative Appeals Office*, dated January 10, 2006.

On March 10, 2006, the applicant filed the present Motion to Reconsider the AAO's decision. On motion, counsel for the applicant contends that the applicant is no longer inadmissible under section 212(a)(2)(A)(i)(I) of the Act. *Brief in Support of Motion*, submitted March 10, 2006. Counsel asserts that the applicant's convictions under California Penal Code sections 472 and 476 were vacated and criminal proceedings against her were terminated. *Letter from Counsel*, dated November 23, 2005. Counsel contends that the two convictions were vacated pursuant to California Penal Code section 1016.5(a) for procedural defects in the underlying criminal proceeding, and thus they do not constitute convictions for immigration purposes under the authority of *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). *Id.* at 2. Counsel asserts that, as the applicant's remaining conviction under California Penal Code section 484(a) meets the petty offense exception provided by section 212(a)(2)(A)(ii)(II) of the Act, the applicant is not inadmissible and she no longer requires a waiver of inadmissibility under section 212(h) of the Act. *Id.*

Upon review, the applicant has established that her convictions under California Penal Code sections 472 and 476 were in fact vacated due to procedural defects in the underlying criminal proceeding. As evidence that these two crimes were vacated, the applicant submitted a summary of proceedings from the Municipal Court of West Covina Courthouse Judicial District, County of Los Angeles, State of California (the court), with entries dated from February 10, 1997 to September 20, 2005. The court record reflects that the applicant entered a plea of not guilty to each charge on February 10, 1997. *Court Record* at 1-2. The applicant was permitted to withdraw her plea, and she entered a new plea of guilty to each charge on February 26, 1997. *Id.* at 2-3. The court record reflects that, on May 16, 2005, a public defender filed a motion to vacate the convictions. *Id.* at 4-5. The motion was granted on the same day, yet no reason for vacating the convictions was provided. *Id.* On September 20, 2005, a public defender filed a motion for *nunc pro tunc* action regarding the convictions. *Id.* at 5. Ostensibly in response to this motion, the court made an entry to the court record that states "Motion to Vacate Plea/Conviction granted on 5-16-05 was granted pursuant to Penal Code section 1016.5(A)." *Id.*

California Penal Code section 1016.5 states the following:

- (a) Prior to acceptance of a plea of guilty or *nolo contendere* to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

- (b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or *nolo contendere* may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or *nolo contendere*, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

The court record reflects that the applicant was given the advisement provided in California Penal Code section 1016.5(a) on February 10, 1997, the date she entered pleas of not guilty to charges under California Penal Code sections 472 and 476. However, the court record does not reflect that she again received the advisement provided in California Penal Code section 1016.5(a) on the date she withdrew her guilty pleas and entered new pleas of guilty, on February 26, 1997. Thus, the court record suggests that the court was in violation of California Penal Code section 1016.5(a) by accepting the applicant's guilty pleas without administering the proper advisement of possible immigration consequences. As the court vacated the guilty pleas and convictions with reference to California Penal Code section 1016.5(a), the record shows by a preponderance of the evidence that the court vacated the guilty pleas and convictions pursuant to the operation of California Penal Code section 1016.5(b). Specifically, the applicant entered her guilty pleas after January 1, 1978, and the resulting convictions had significant immigration consequences for her, including inadmissibility and possible deportation. California Penal Code section 1016.5(b). Accordingly, the applicant has shown that her convictions under California Penal Code sections 472 and 476 have been vacated.

In *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), the Board of Immigration Appeals (BIA) drew 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 Pickering* at 624.

In the present matter, the court vacated the applicant's convictions under California Penal Code sections 472 and 476 due to a procedural defect in the underlying criminal proceedings. Specifically, the applicant was not properly advised of the possible immigration consequences of her guilty pleas, as required by California Penal Code section 1016.5(a). The record does not show that the applicant's convictions were vacated solely for rehabilitation or to ameliorate immigration hardships. *Matter of Pickering* at 624. Thus, the applicant has established that her convictions under California Penal Code sections 472 and 476 cease to exist for immigration purposes. *Id.*

The applicant remains convicted of a single count under California Penal Code section 484(a) for misdemeanor theft of property. Counsel contends that this conviction meets the petty offense exception provided in section 212(a)(2)(A)(ii), and thus the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(2)(A)(ii) of the Act states in pertinent part, that:

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

(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 maximum possible sentence for a misdemeanor in California, including convictions for theft of property under California Penal Code section 484(a), is one year of incarceration. California Penal Code section 19.2. The applicant received a suspended sentence of 180 days of incarceration, two years of probation, and one day in county jail. Accordingly, the record establishes that the applicant's conviction under California Penal Code section 484(a) meets the requirements for the exception under section 212(a)(2)(A)(ii).

The applicant has shown that she is no longer inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The record does not reflect that the applicant is inadmissible on any other grounds. Therefore, she does not require a waiver of a ground of inadmissibility, and her Form I-601 application will be declared moot.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained her burden.

ORDER: The motion is granted, the previous decisions of the district director and the AAO are withdrawn and the Form I-601 application is declared moot.