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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

FILE: [redacted] Office: CHICAGO, IL Date: DEC 20 2010

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Poland who 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 committed violations related to a controlled substance. The applicant's stepmother and father are lawful permanent residents. The applicant seeks a waiver of inadmissibility in order to reside in the United States.

The field office director concluded that the applicant had failed to establish extreme hardship to his father and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, at 5-6, dated August 21, 2007.

On appeal, counsel asserts that the applicant has demonstrated reformation of character, has brought forth sufficient evidence of extreme hardship, and the testimony and minor legal violations do not demonstrate that the applicant was a "drug abuser" as found by United States Citizenship and Immigration Services (USCIS). *Form I-290B*, at 2, received September 24, 2007. He also asserts that in light of the new evidence submitted regarding the applicant's criminal history, the denial should be reconsidered and the waiver granted. *Counsel's Letter*, at 1, dated June 23, 2010.

The record includes, but is not limited to, counsel's letter and the applicant's criminal record. The entire record was reviewed and considered in arriving at a decision on the appeal.

On May 24, 2006, the applicant pled guilty to operating a vehicle with a controlled substance in the body under Indiana Code 9-30-5-1(c) and illegal possession of alcohol under Indiana Code 7.1-5-7-7. The record reflects that the controlled substance was marijuana. *Affidavit for Probable Cause*, dated March 18, 2006. The AAO notes that as this case arises under the jurisdiction of the U.S. Court of Appeals for the Seventh Circuit, we may consider documents, such as the probable cause affidavit, which are outside the record of conviction in determining the crime committed.[1] *Mata-Guerrero v. Holder*, 2010 WL 4746189 (7th Cir. 2010).

The record also reflects that the applicant was convicted under Chapter 720 of the Illinois Compiled Statutes Act 550, Section 4(b) of possession of cannabis (more than 2.5 grams and less than 10 grams) on March 3, 2006 in the Circuit Court of Cook County, Illinois. The record reflects that this conviction was vacated on June 13, 2010. *Agreed Order, Case No. 05500342201*, dated June 13, 2010. The Board of Immigration Appeals (BIA) has held that vacation of a plea will vacate the conviction for immigration purposes as long as it was not pursuant to a rehabilitative statute or because of immigration hardship. *See, e.g. Matter of Adamiak*, 23 I. & N. Dec. 878, 879 (BIA 2006)(where the criminal court failed to advise the defendant of the immigration consequences of his plea pursuant to section 2943.031 of the Ohio Revised Code, the subsequent vacatur is not a

[1] The court in *Matter of Short* included the indictment, plea, verdict, and sentence in its definition of the record of conviction. *Matter of Short*, 20 I&N Dec. 136 (BIA 1989).

conviction for immigration purposes because the guilty plea has been vacated as a result of a "defect in the underlying criminal proceedings" and not for a rehabilitative or immigration hardship purpose); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (concluding that in light of the language and legislative purpose of the definition of a "conviction" at section 101(a)(48) of the Act, "there is a significant 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"); and *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court's vacation of a conviction under a statute that was neither an expungement nor a rehabilitative statute). See also, *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999)(under the definition in section 101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute).

Therefore, as the order vacating the applicant's conviction fails to establish that the applicant's conviction was vacated on the basis of a procedural or substantive defect, the conviction will still be considered in these immigration proceedings. The AAO notes that the burden of proof is on the applicant to establish the basis on which his conviction was vacated. *See* section 291 of the Act, 8 U.S.C. § 1361.

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

> (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, or
>
> (II) A violation (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

> (h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

Section 212(h) of the Act provides a waiver of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act only insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana. As the record reflects that the applicant has two convictions related to controlled substances, he is not eligible to apply for a section 212(h) waiver.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) 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.