(b)(6)

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

[redacted]

Date: MAY 19 2014 Office: ATLANTA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Adjustment from Temporary to Permanent Resident Status under Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application for adjustment from temporary to permanent resident status in the legalization program was denied by the Director, Atlanta Service Center. The applicant filed a motion to reopen and reconsider the decision, which was subsequently denied by the director. The matter is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The director denied the adjustment application because the applicant was found to be inadmissible under Section 212(a)(2)(A) of the Act and, therefore, ineligible to adjustment to permanent resident status.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

On appeal, counsel, on behalf of the applicant, asserts that the applicant's conviction has been vacated *nunc pro tunc* and, as a result, the applicant is no eligible to adjust her status to that of a permanent resident. In response to the AAO's Request for Evidence (RFE), dated March 4, 2014, counsel submits additional documentation in support of the applicant's claim.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The matter is properly before the AAO on appeal. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 8 C.F.R. § 245a.3 states, in pertinent part:

> (b) *Eligibility.* Any alien who has been lawfully admitted for temporary resident status under section 245A(a) of the Act, such status not having been terminated, may apply for adjustment of status of that of an alien lawfully admitted for permanent residence if the alien…
>
> (3) Is admissible to the United States . . . and has not been convicted of any felony, or three or more misdemeanors . . . .

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

> (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 . . . is inadmissible.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Section 101(a)(48) of the Immigration and Nationality Act (the Act) provides:

> (A) The term "conviction" means . . . a formal judgment of guilt . . . entered by a court or, if adjudication of guilt has been withheld, where—
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> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
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> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Where an alien pleads guilty or nolo contendere, or is found guilty, but entry of the judgment is deferred by the court to allow for a period of probation and/or completion of a diversion program, the alien has been convicted for immigration purposes even if the charges are later dismissed. *See Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 714-15 (A.G. 2005); *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999).

By contrast, an alien has *not* been convicted for immigration purposes where the criminal charges were dismissed following successful completion of a pretrial diversion program which occurred prior to any pleading or finding of guilt. *Matter of Grullon* , 20 I&N Dec. 12, 14-15 (BIA 1989) (citing *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988)). For there to be no conviction in such a case, the alien must not have entered a plea of guilty or nolo contendere and there must have been no adjudication of guilt or imposition of punishment or restraint by a court. *Id.*

The record reflects that in 2007, the applicant was charged in state court with one felony count of violating the Georgia Controlled Substance Act. The applicant pled guilty on April 20, 2007. In response to the AAO's RFE, counsel submits court documents relating to the conviction. Counsel submits a Consent Order Vacating and Setting Aside Plea and Nolle Pros, dated February 17, 2011. The order states that the conviction was vacated "on the basis of the plea being unconstitutional as not having been a knowing, voluntary and intelligent waiver of Defendant's rights."

Under the current statutory definition of "conviction" set forth in section 101(a)(48)(A) of the Act, "a state action that purports to abrogate what would otherwise be considered a conviction, as the result of the application of a state rehabilitative statute, rather than as the result of a procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether an alien has been convicted for immigration purposes." *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, does not expunge a conviction for immigration purposes. *See id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a conviction is vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes), *reversed on other grounds*, *Pickering v. Gonzales*, 465

F.3d 263 (6th Cir. 2006). Here, as the court vacated the applicant's conviction on grounds relating to a constitutional violation, the applicant is deemed to have no conviction.

The record also reflects that the applicant was arrested and charged on June 29, 2006 with *family violence battery, second offense,* a felony, in violation of section 16-5-23.1(F)(2) of the Official Code of Georgia Annotated (OCGA). In response to the AAO's March 4, 2014 RFE, counsel submits court documents reflecting that the charge was dismissed based on the applicant's completion of pretrial diversion.

Finally, the record reflects that the applicant was arrested and charged on February 15, 2008 for *failure to appear,* a misdemeanor, in violation of section 17-6-12 of the OCGA. In response to the AAO's RFE, counsel asserts that the applicant's failure to appear was due to administrative error. Counsel states that the applicant properly notified the Court of her change of address on November 14, 2006; however, on December 18, 2007, the Court mailed her notice to her previous address. Counsel contends that the applicant appeared and the underlying case moved forward, resolving the matter on August 13, 2008, when both misdemeanor offenses of battery and disorderly conduct were *nolle prossed.* The record contains court documents reflecting the applicant's change of address and that the charges were dismissed.

Based on the above, the applicant is admissible and, therefore, eligible for adjustment from temporary to permanent resident status.

ORDER: The appeal is sustained. The matter is remanded for further adjudication of the applicant's application for adjustment from temporary to permanent resident status in accordance with the foregoing decision.