



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: JUN 21 2013

Office: TEGUCIGALPA

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Tegucigalpa, Honduras, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Nicaragua who entered the United States without inspection on September 2, 1988, at the age of 15. He filed an application for asylum, which was denied on April 4, 1989. The Board of Immigration Appeals (Board) dismissed his appeal on October 19, 1990 and the applicant was granted 30 days to depart the United States voluntarily. He failed to depart as ordered. On August 16, 1995, he entered a plea of *nolo contendere* to cocaine possession in violation of Fla. Stat. § 893.13(6)(a) and was sentenced to probation. On April 14, 1998, the applicant filed an application for adjustment of status under NACARA, which was denied on September 9, 2000. On October 28, 2008, he was removed from the United States at government expense.

The applicant has been found to be inadmissible 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 relating to a controlled substance; section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for seeking admission to the United States after having been removed; and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. He is the beneficiary of an approved Petition for Alien Relative (Form I-130) and he seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his U.S. citizen spouse, children, and parents.

The field office director determined that that applicant was statutorily ineligible for a waiver due to his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. The field office director also found that the applicant had failed to demonstrate that his qualifying relatives would suffer extreme hardship if the waiver application were denied. Finally, the field office director found that the applicant had failed to show that he was eligible for a waiver in the exercise of discretion. *See Field Office Director's Decision*, dated June 20, 2012.

On appeal, counsel for the applicant alleges that the field office director erred in finding that the applicant had been convicted of a controlled substance offense. Counsel explains that the applicant's plea of *nolo contendere* was vacated ten years after his conviction due to the presentation of new exculpatory evidence, so he was not "convicted" for immigration purposes. Additionally, counsel claims that the field office director erred in finding that the applicant's qualifying relatives would not suffer extreme hardship if the waiver application were denied. Counsel asserts that the applicant's U.S. citizen spouse, children, and parents have suffered extreme hardship since the applicant was removed to Nicaragua and that they will continue to suffer such hardship in the future if the waiver application is denied. Finally, counsel claims that the field office director's denial of the applicant's request for a waiver was an abuse of discretion.

The record contains, but is not limited to: documentation regarding the applicant's criminal history; statements from the applicant, his qualifying spouse, and his father; letters of support from the qualifying spouse's employer, friends, and customers; country conditions information; and medical and educational records relating to the applicant's eldest son. The entire record was reviewed and considered in rendering this decision on appeal.

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

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 —

...

(II) a violation of (or 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.

The record reflects that on August 16, 1995, the applicant entered a plea of *nolo contendere* to cocaine possession in violation of Fla. Stat. § 893.13(6)(a). The court withheld adjudication of guilt and sentenced the applicant to six months of probation. On June 2, 2005, the court entered an order vacating the applicant's plea and "the Assistant State Attorney announced *nolle pros* . . ." See Order, *The State of Florida vs. Gustavo Adolfo Perez*, dated June 2, 2005.

Section 101(a)(48) of the Act provides:

(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(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

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Under the current statutory definition of “conviction” provided at section 101(a)(48)(A) of the Act, 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. *Matter of Roldan*, 22 I&N Dec. 512 (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, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In *Matter of Pickering*, the Board reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes. 23 I&N Dec. 621, 624 (BIA 2003).

Counsel asserts that the applicant was not convicted for immigration purposes. He alleges that the applicant entered a plea of *nolo contendere* not because he was guilty but because he felt the plea was in his best interest. He further states that in 2005, a witness came forward with evidence exonerating the applicant. Therefore, counsel states that the plea was vacated due to a procedural or substantive defect in the criminal proceedings rather than for rehabilitative or immigration purposes.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. The order vacating the applicant’s plea does not specify the reason for the action; instead, it states that the matter came before the court “pursuant to defense attorney’s oral motion to vacate plea.” The order further indicates that the “Withholding,” “Finding of Guilt,” “Plea,” “Probation,” and “Successful termination of probation” be “vacated, set aside and held for naught.” *Order, The State of Florida vs. [REDACTED]* [REDACTED] Finally, the order states, “Further, the Assistant State Attorney announced nolle pros in the above styled cause.” *Id.*

In support of his claim that his plea was vacated because he was exonerated, the applicant has submitted a letter from his criminal defense attorney, [REDACTED]. [REDACTED] writes that although the applicant was convicted in 1995 after cocaine was found in his vehicle, “the cocaine did not belong to him nor did he know the cocaine existed.” *Letter from [REDACTED]* dated July 25, 2005. [REDACTED] further states that the applicant entered his plea not because he was guilty, but “[a]s a matter of convenience” in order to close the case against him. *Id.* [REDACTED] also notes that on January 12, 2005, a person named [REDACTED] appeared in his office and offered new information which tended to exonerate the applicant. *Id.* [REDACTED] then contacted the Assistant State Attorney to inform her of the new information and to tell her that the applicant wished to volunteer with the homeless in his community. *Id.* According to [REDACTED]

Assistant State Attorney [REDACTED] ultimately agreed to dismiss the matter due to the disclosure by [REDACTED] exculpating [the applicant]. [REDACTED] also requested proof that [the applicant] was a good resident and putting back into the community. It was agreed that we would furnish proof of community service and

upon completion of a reasonable number of hours the matter would be brought back before the Court.

concludes:

I believe that the truth of [the applicant] not being criminally responsible is the real basis of the Nolle Prose. The case certainly was not vacated and dismissed simply because [the applicant] furnished proof that he performed a few hours of service to his community. If that were the case every criminal in town would clear their record.

The applicant has also submitted a statement from [redacted] regarding the new information he offered to [redacted] to exonerate the applicant. In his statement, [redacted] writes that he was a passenger in the applicant's car on the day the applicant was arrested. He states that another friend, [redacted] was also in the car. [redacted] relates that when the police pulled the applicant over:

[redacted] [sic] took a plastic bag out of his pocket and made some motion which I believe he was [sic] emptying the contents onto the floor. He then put the empty plastic bag on the console. I saw [the applicant] take the empty plastic bag and put it into his pocket. Later, I learned that [the applicant] had been arrested because there was cocaine residue in the bag. I do not believe this is correct because [the applicant] did not possess cocaine and should not have been arrested.

Affidavit of [redacted] dated January 12, 2005.

The AAO finds that the applicant has failed to demonstrate that his plea was vacated due to a procedural or substantive defect rather than for rehabilitative or immigration purposes. As noted above, the court order vacating the plea does not specify the reason for the order. The letters from [redacted] are not part of the conviction records. Finally, the letter from [redacted] suggests that the vacatur was based at least in part on rehabilitation, as the State Attorney agreed to the request to vacate only after the applicant provided proof of a certain number of community service hours. Thus, the applicant has not shown that he was erroneously found inadmissible under section 212(a)(2)(C) of the Act.

Based on the foregoing, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, for which no waiver is available. No purpose would be served in evaluating his eligibility for a waiver under section 212(a)(9)(B)(v) of the Act or determining whether he merits a favorable exercise of discretion. Accordingly, the appeal will be dismissed.

The AAO notes that the field office director denied the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, in the same decision. An application for permission to reapply for admission is denied, in the

exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964). As the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act no purpose would be served in granting the applicant's Form I-212.

ORDER: The appeal is dismissed.