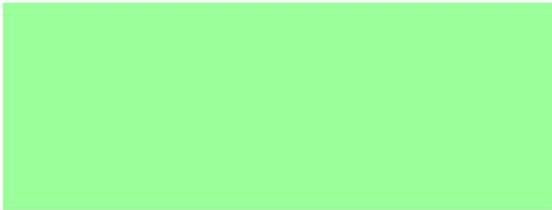


(b)(6)

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



Date: **MAR 06 2014** Office: VERMONT SERVICE CENTER FILE:

IN RE: PETITIONER:

PETITION: Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:

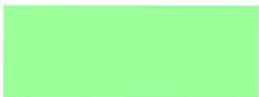
INSTRUCTIONS:

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

for Ron Rosenberg
Chief, Administrative Appeals Office



DISCUSSION: The Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

Applicable Law

Section 101(a)(15)(U)(i) of the Act provides for U nonimmigrant classification to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion.

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

(2) 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 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 . . .

* * *

is inadmissible.

* * *

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

(i) In General.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

* * *

(7) Documentation requirements.-

* * *

(B) Nonimmigrants.-

(i) In general.-Any nonimmigrant who-

(I) Not in possession of a passport valid for a minimum of six months from the date of expiration . . .

* * *

is inadmissible.

* * *

(9) Aliens Previously Removed

* * *

(B) Aliens Unlawfully Present

(i) In General.-Any alien (other than an alien lawfully admitted for permanent residence) who-

* * *

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

* * *

(C) Aliens Unlawfully Present After Previous Immigration Violations

(i) In General.-Any alien who -

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

* * *

and who enters or attempts to reenter the United States without being admitted is inadmissible.

Factual and Procedural History

The petitioner, a native and citizen of Mexico who was born on May 24, 1980, initially entered the United States without inspection, admission or parole in January 1989, when she was eight years of age. She departed the United States in 1995, and reentered without inspection, admission or parole in June 1995, when she was 15 years of age. She departed the United States in 1997, and reentered without inspection, admission or parole in July 2000, when she was 20 years of age. She departed the United States, and reentered without inspection, admission or parole in June 2001, when she was 21 years of age. The petitioner filed the instant Form I-918 U petition on December 22, 2011, with an accompanying Form I-192, Application for Advance Permission to Enter as Nonimmigrant (Form I-192). The director issued a Request for Evidence (RFE), noting that the petitioner was inadmissible to the United States. The petitioner responded with additional evidence. On July 2, 2013, the director found the petitioner's response insufficient to overcome her grounds of inadmissibility and denied the Form I-192. The director determined that the petitioner was inadmissible under sections 212(a)(2)(A)(i)(II) (controlled substance violations), 212(a)(6)(A)(i) (present without admission or parole), 212(a)(7)(B)(i)(I) (not in possession of a valid passport), 212(a)(9)(B)(i)(II) (unlawfully present in the United States for one year or more), and 212(a)(9)(C)(i)(I) (unlawfully present in the United States for one year or more and reentering the United States without being admitted) of the Act. The director denied the petitioner's Form I-918 U petition on the same day. Although the director determined that the petitioner was statutorily eligible for U nonimmigrant status, he denied the Form I-918 U petition because the petitioner was inadmissible to the United States. The petitioner, through counsel, timely appealed the denial of the Form I-918 U petition.

On appeal, counsel claims that the director should have favorably exercised his discretion and considered the hardship to the petitioner's husband if she returned to Mexico. In addition, counsel contends that the director erred in finding the petitioner inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act, since she was under 18 years of age at the time of her unlawful presence and entries into the United States and that the petitioner's possession of a controlled substance conviction was dismissed so her theft conviction does not constitute a crime involving moral turpitude.

Analysis

All nonimmigrants must establish their admissibility to the United States or show that any grounds of inadmissibility have been waived. 8 C.F.R. § 214.1(a)(3)(i). For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 in conjunction with a Form I-918 U petition in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: "There is no appeal of a decision to deny a waiver." As the AAO does not have jurisdiction to review whether the director properly denied the Form I-192, the AAO does not consider whether approval of the Form I-192 should have been granted. The only issue before the AAO is whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

A full review of the record supports the director's determination that the petitioner is inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole) and 212(a)(7)(B)(i)(I) (not in possession of a valid passport) of the Act. The petitioner does not dispute that she is present in the United States without admission or parole, and she has not provided a copy of a valid passport. As noted above, the petitioner has a lengthy immigration history including multiple departures from the United States and reentries without inspection. As such the petitioner is inadmissible under sections 212(a)(6)(A)(i) and 212(a)(7)(B)(i)(I) of the Act.

The record shows that on October 27, 2003, the petitioner was convicted of theft/shoplifting and possession of marijuana, in violation of sections 94-74(a) and 94-218(b) of the [REDACTED] Municipal Ordinance, respectively, for which she was ordered to pay a fine. On October 22, 2013, the petitioner's charge of possession of marijuana in violation of the [REDACTED] Municipal Ordinance § 94-218 was dismissed by an [REDACTED] Municipal Court judge. In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), the Board of Immigration Appeals (Board) found that there is a 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. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (holding that a conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (reversing *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)). Thus, 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. *Pickering* at 266. To establish that her conviction has been vacated for immigration purposes, the petitioner must prove that in dismissing the charge of possession of marijuana, the [REDACTED] Municipal Court judge acted to correct a procedural or substantive defect in its proceedings. A copy of the Joint Motion to Amend and Clarify Plea dated October 22, 2013, indicates that the petitioner's guilty plea to possession of marijuana was unconstitutional and counsel requested that it be dismissed. The judge withdrew the guilty plea and dismissed the charge. Therefore, the petitioner's conviction for possession of marijuana is no longer a valid conviction for immigration purposes, and it cannot be determined that this is a conviction related to a controlled substance under section 212(a)(2)(A)(i)(II) of the Act.

The director also found the petitioner inadmissible under sections 212(a)(9)(B)(i)(II) (unlawfully present in the United States for one year or more) and 212(a)(9)(C)(i)(I) (unlawfully present in the United States for one year or more and reentering the United States without being admitted) of the Act. Under section 212(a)(9)(B)(ii) of the Act, an "alien is deemed to be unlawfully present in the United States if the alien is present . . . without being admitted or paroled." However, "[n]o period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence . . ." *See* section 212(a)(9)(B)(iii) of the Act. The petitioner was born on May 24, 1980, and entered the United States without inspection, admission or parole several times prior to her 18th birthday. She departed the United States when she was 17 years of age, and reentered without inspection, admission or parole in July 2000, when she was 20 years of age. She departed the United States on an unknown date, and admitted in her Form I-918 U petition that she reentered without inspection, admission or parole in June 2001, when she

was 21 years of age. The record does not show that the petitioner accrued a year or more of unlawful presence before her last entry without inspection in June 2001, and there is no evidence that she has departed the United States since her last entry. Therefore, the petitioner is not inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act. This portion of the director's decision will be withdrawn.

On appeal, counsel does not contest the petitioner's inadmissibility under sections 212(a)(6)(A)(i) and 212(a)(7)(B)(i)(I) of the Act, but instead focuses her assertions on why the director should have favorably exercised his discretion, determined that the petitioner was not a danger to the community, and approved the petitioner's Form I-192 waiver application.

The director denied the petitioner's application for a waiver of inadmissibility and we have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 U petition. 8 C.F.R. § 212.17(b)(3).

Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Although the petitioner has met the statutory eligibility requirements for U nonimmigrant classification, she has not established that she is admissible to the United States or that her grounds of inadmissibility have been waived. She is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act, pursuant to 8 C.F.R. § 214.1(a)(3)(i).

ORDER: The appeal is dismissed. The petition remains denied.