



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF S-S-

DATE: AUG. 30, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-918, PETITION FOR U NONIMMIGRANT STATUS

The Petitioner seeks "U-1" nonimmigrant classification as a victim of qualifying criminal activity. *See* Immigration and Nationality Act (the Act) sections 101(a)(15)(U) and 214(p), 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p). The U-1 classification affords nonimmigrant status to victims of certain crimes who assist authorities investigating or prosecuting the criminal activity.

The Director, Vermont Service Center, denied the Form I-918, Petition for U Nonimmigrant Status (U petition). The Director concluded that the U petition was not approvable because the record established the Petitioner's inadmissibility and the Petitioner's Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application), requesting a waiver of the grounds of inadmissibility, had been denied.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief and additional evidence. The Petitioner claims that the Director's denial of her waiver application contained inaccuracies in regard to her criminal history and that she merits a favorable exercise of discretion.

Upon *de novo* review, we will dismiss the appeal.

I. APPLICABLE LAW

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 U petition and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion. A petitioner bears the burden of establishing that he or she is admissible to the United States or that any grounds of inadmissibility have been waived. *See* 8 C.F.R. § 214.1(a)(3)(i).

For individuals 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 waiver application in conjunction with the 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: "[t]here is no appeal of a decision to deny a

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waiver.”¹ Although the regulations do not provide for appellate review of the Director’s discretionary denial of a waiver application, we may, however, consider whether the Director’s underlying determination of inadmissibility was correct.

II. ANALYSIS

A. The Petitioner’s Criminal History

The record demonstrates the following criminal history:

- [REDACTED] 1996 conviction for Prostitution under section 167.007 of the Oregon Revised Statutes Annotated
- [REDACTED] 1999 conviction for Unlawful possession of firearms under section 166.250 of the Oregon Revised Statutes Annotated
- [REDACTED] 1999 conviction for Prostitution under section 167.007 of the Oregon Revised Statutes Annotated
- [REDACTED] 2006 plea of guilty for Possession of designated controlled substances under section 11350(a) of the California Health & Safety Code
- [REDACTED] 2009 conviction for Disorderly conduct under section 647(f) of the California Penal Code
- [REDACTED] 2009 conviction for Fighting; noise; offensive words under section 415 of the California Penal Code
- [REDACTED] 2010 plea of *nolo contendere* and conviction for Unauthorized possession of a controlled substance under section 11377(a) of the California Health & Safety Code

B. Grounds of Inadmissibility

In the denial of the Petitioner’s waiver application, the Director concluded that because of the Petitioner’s criminal history, the Petitioner was inadmissible under the following provisions of the Act:

- Section 212(a)(1)(A)(iv), Drug Addict/Abuser
- Section 212(a)(2)(A)(i)(I), Crime Involving Moral Turpitude (CIMT)
- Section 212(a)(2)(A)(i)(II), Controlled Substance Violator²
- Section 212(a)(2)(D)(i), Prostitution Within Last 10 Years

8 U.S.C. § 1182.

¹ The Petitioner filed a new waiver application at the same time as this appeal and requested that the U petition be reconsidered pending adjudication of the new waiver application. The record reflects that the waiver application was denied on January 26, 2016.

² In her denial, the Director erroneously referred to this provision of the Act as section 212(a)(2)(A)(ii), which contains the provisions for an exception to a crime involving moral turpitude.

After consideration of the evidence of the Petitioner's rehabilitation and her criminal history, the Director further concluded that the mitigating factors did not outweigh the negative factors in the record, and it was not in the public interest to favorably exercise discretion.

On appeal, the Petitioner asserts that the Director's conclusions concerning her criminal history related to drug convictions were erroneous. Specifically, the Petitioner argues that although in 2006 she originally pled guilty to and was convicted under section 11350(a) of the California Health and Safety Code, the conviction was later dismissed under section 1000 of the California Penal Code. The Petitioner makes a similar argument regarding her 2010 *nolo contendere* plea and subsequent conviction, stating that although she "originally entered a plea to possession" it was later withdrawn, and she was convicted of an offense under section 32 of the California Penal Code. The Petitioner does not make any further assertions in regard to the Director's findings of inadmissibility, but discusses mitigating factors for consideration in the adjudication of a waiver application.

1. Inadmissibility Under Section 212(a)(1)(A)(iv)

In the denial of the Petitioner's waiver application, the Director generally referred to the Petitioner's criminal convictions for drug-related offenses. The Director also acknowledged the Petitioner's laboratory results as reported by a "Drug Pain Panel," and a letter from the Petitioner's physician as evidence of "positive behavior changes" in the Petitioner's life. The Director did not, however, state the basis for determining the Petitioner inadmissible under section 212(a)(1)(A)(iv) of the Act. For such a finding of inadmissibility, an individual must be deemed a drug abuser or addict "in accordance with regulations prescribed by the Secretary of Health and Human Services." Section 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv). Only medical examiners, such as panel physicians, civil surgeons, or other physicians designated by the Director of Health and Human Services can make this determination before we will find an individual inadmissible under section 212(a)(1)(A)(iv) of the Act. See 42 C.F.R. § 34.3(a)(4) (stating, in part: "In performing examinations, medical examiners shall consider those matters that relate to . . . [d]rug abuse or drug addiction . . ."). As there is no such determination in the record, and although the Petitioner does not assert any error in the Director's inadmissibility determination, we conclude that the Petitioner is not inadmissible pursuant to section 212(a)(1)(A)(iv) of the Act and withdraw this portion of the Director's finding.

2. Inadmissibility Under Section 212(a)(2)(A)(i)(I)

In the denial of the Petitioner's waiver application, the Director generally concluded that the Petitioner was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for committing offenses defined as CIMTs. However, the Director did not specify or provide any analysis of the Petitioner's criminal offenses considered in making this determination.

a. The Petitioner's Convictions for Prostitution

At the time of the Petitioner's convictions for prostitution, section 167.007 of the Oregon Revised Statutes Annotated provided:

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- (1) A person commits the crime of prostitution if:
 - (a) The person engages in or offers or agrees to engage in sexual conduct or sexual contact in return for a fee; or
 - (b) The person pays or offers or agrees to pay a fee to engage in sexual conduct or sexual contact.
- (2) Prostitution is a Class A misdemeanor.

Or. Rev. Stat. Ann. § 167.007 (West 1996, 1999).

Prostitution involves conduct that has been determined by the courts to be morally turpitudinous. In *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012), the Ninth Circuit Court of Appeals held that solicitation of prostitution in California is a CIMT. In making this determination, the Court stated “soliciting an act of prostitution is not significantly less ‘base, vile, and depraved’ than engaging in an act of prostitution.” *Id.* at 1089. The Court further stated that it would give deference to *Matter of W*, 4 I&N Dec. 401 (BIA 1951), in which the Board of Immigration Appeals “held that an ordinance that criminalized a single act of prostitution dealt with a crime involving moral turpitude.” *Rohit*, 670 F.3d at 1090. Accordingly, we agree with the Director’s determination that the Petitioner’s two convictions for prostitution are CIMTs that render her inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

b. The Petitioner’s Conviction for Unlawful Possession of a Firearm

At the time of the Petitioner’s conviction for unlawful possession of a firearm, section 166.250 of the Oregon Revised Statutes Annotated provided:

- (1) [A] person commits the crime of unlawful possession of a firearm if the person knowingly:
 - (a) Carries any firearm concealed upon the person;
 - (b) Possesses a handgun that is concealed and readily accessible to the person within any vehicle; or
 - (c) Possesses a firearm . . .

....

- (4) Unlawful possession of a firearm is a Class A misdemeanor.

Or. Rev. Stat. Ann. § 166.250 (West 1999).

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The Petitioner's conviction for unlawfully possessing a firearm is not a CIMT. Absent the element of intent to harm another individual, the mere possession of a firearm is not morally turpitudinous conduct. *Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 801 (9th Cir. 2015) (quoting *Matter of Serena*, 20 I&N Dec. 579, 584 (BIA 1992), "[C]arrying or possessing a concealed weapon has been held to involve moral turpitude only when the intent to use it against another person has been established[.]"); *Matter of S-*, 8 I&N Dec. 344, 346 (BIA 1959) (stating "[t]he essence of the offense is the carrying of the dangerous weapon with a base, evil and vicious intent to injure another . . ."). As the offense of unlawful possession of a firearm defined in the Oregon Revised Statutes does not include the element of intent to harm another, the Petitioner's conviction is not a CIMT.

3. Inadmissibility Under Section 212(a)(2)(A)(i)(II)

a. The Petitioner's Conviction Under Section 647(f) of the California Penal Code

The Petitioner is inadmissible under section 212(a)(2)(A)(i)(II) of the Act because of her 2009 conviction in violation of section 647(f) of the California Penal Code. At the time of the Petitioner's conviction, this provision stated, in part:

Every person who commits any of the following acts is guilty of disorderly conduct . . .

.....

- (f) Who is found in any public place under the influence of . . . any drug, controlled substance . . . or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of . . . any drug, controlled substance . . . or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

In the brief submitted with her appeal, the Petitioner generally acknowledges that she was convicted for an offense under section 647(f) because she was "drunk in public." The Petitioner's rendition of the underlying basis for the conviction contradicts the complaint and conviction documents that she submitted as evidence of her criminal history, which indicated that the Petitioner had in her possession cocaine, a controlled substance, and that she violated the "drugs/controlled substances" portion of section 647(f). Accordingly, the Director correctly determined that the Petitioner's conviction renders her inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

b. The Petitioner's Conviction for Possession of Designated Controlled Substances

The record reflects that subsequent to the Petitioner's arrest in [REDACTED] 2005 for an offense in violation of section 11350(a) of the California Health & Safety Code, the Petitioner was permitted to

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participate in California's drug rehabilitation program under section 1000 of the California Penal Code. Pursuant to the requirements of this program, in [REDACTED] 2006, the Petitioner pled guilty to possession of a controlled substance, and the judge presiding over the proceedings deferred entry of judgment.³ Upon successful completion of the program, in [REDACTED] 2007, the charge under section 11350(a) was dismissed.

When discussing the effect of a state rehabilitative statute (i.e., section 1000 of the California Penal Code) on a first-time simple possession drug conviction, the Ninth Circuit Court of Appeals in *Romero v. Holder*, 568 F.3d 1054, 1058, 1062 (9th Cir. 2009), referred to its holding in *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728, 749 (9th Cir. 2000) and concluded "convictions are nullified for the purposes of immigration law if they were expunged under the [Federal First Offender Act (FFOA)], or if they were expunged under a state rehabilitative law but could have been tried under the FFOA." Upon review of subsequent decisions by the Board of Immigration Appeals and eight Circuit Courts of Appeal, the Court of Appeals in *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011), overruled *Lujan-Armendariz* and related cases, including *Romero*, holding, in part, "the constitutional guarantee of equal protection does not require treating, for immigration purposes, an expunged state conviction of a drug crime the same as a federal drug conviction that has been expunged under the FFOA." The Court further determined that its holding would apply only prospectively:

After our decision today, alien defendants will know that an expunged state-law conviction for simple possession *will* have adverse immigration consequences. (footnote omitted) . . . For those aliens convicted before the publication date of this decision, *Lujan-Armendariz* applies. For those aliens convicted after the publication date . . . *Lujan-Armendariz* is overruled.

Id. at 693-94.

The Court noted that individuals who relied on *Lujan-Armendariz*:

³ At the time of the Petitioner's conviction, section 1000 of the California Penal Code provided, in part:

- (a) This chapter shall apply whenever a case is before any court upon an accusatory pleading for a violation of Section 11350 . . . of the Health and Safety Code . . . and it appears to the prosecuting attorney that . . . all of the following apply to the defendant:
.....
- (b) The prosecuting attorney shall review his or her file to determine whether or not paragraphs (1) to (6), inclusive, of subdivision (a) apply to the defendant . . . This procedure is intended to allow the court to set the hearing for deferred entry of judgment at the arraignment.

Cal. Penal Code § 1000 (West 2006).

Section 1000.1(d) of the California Penal Code further provided "[a] defendant's plea of guilty pursuant to this chapter shall not constitute a conviction for any purpose . . ." Cal. Penal Code § 1000.1 (West 2006).

[W]ere assured that, after completion of drug treatment, there would be absolutely no legal consequences . . . It would be manifestly unfair to hoodwink aliens into waiving their constitutional rights on the promise of no legal consequences and, then, to hold retroactively that their convictions actually carried with them the ‘particularly severe ‘penalty’ of removal

Id. at 694.

As the Petitioner’s conviction for possession of a controlled substance under section 11350(a) occurred prior to the issuance of the *Nunez-Reyes* decision, the conviction and subsequent dismissal pursuant to a state rehabilitative statute does not render her inadmissible under section 212(a)(2)(A)(i)(II) of the Act. *See Villavicencio-Rojas v. Lynch*, 811 F.3d 1216, 1218 (9th Cir. 2016) (stating “*Nunez-Reyes* does not bar [the appellant] from relief, as his convictions occurred before 2011.”).

4. Inadmissibility Under Section 212(a)(2)(D)(i)

As previously referenced, the Director determined that the Petitioner was inadmissible under section 212(a)(2)(D)(i) of the Act for “Prostitution Within Last 10 years.” In regard to the proscribed 10-year period, the plain language of 212(a)(2)(D)(i) states the Petitioner may not have a prostitution-related offense “within 10 years of the date of application for a visa, admission, or adjustment of status.” The Petitioner was last convicted of a prostitution offense in 1999 and filed the U petition in 2012, more than 10 years since her conviction. Accordingly, the Petitioner is not inadmissible pursuant to section 212(a)(2)(D)(i) of the Act, and we withdraw this portion of the Director’s finding.

III. CONCLUSION

Based on the foregoing, although we have withdrawn portions of the Director’s inadmissibility findings, ultimately the Petitioner remains inadmissible under at least two of the Director’s cited grounds. As the Petitioner has not established that she is admissible to the United States or that the 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).

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). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S-*, ID# 13050 (AAO Aug. 30, 2016)