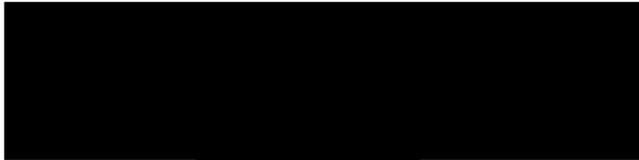


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U.S. Citizenship  
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FILE:

Office: MIAMI (WEST PALM BEACH)

Date: FEB 02 2007

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(h) and 212(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. sections 1182(h) and 1182(i)

ON BEHALF OF APPLICANT:



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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Miami. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED], a citizen of the Bahamas, was found to be inadmissible to the United States pursuant to section 212(a)(1)(A)(iv) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(1)(A)(iv), as a person who has been determined to be a drug abuser or addict; section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance; and pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure an immigration benefit by fraud or misrepresentation. [REDACTED] is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. He is seeking a waiver of inadmissibility in order to remain in the United States with his U.S. citizen spouse and children.

As the record of past filings in this case is complicated and relevant to the decision at issue here, the AAO provides the following summary: On October 23, 1997, [REDACTED] filed an Application to Adjust Status (Form I-485). *Form I-485, 1997*. In connection with this application, he filed an Application for Waiver of Ground of Admissibility (Form I-601) on August 5, 1998, the date an adjustment interview had been scheduled, though no interview was conducted. *Form I-601, 1998*. He and his wife were eventually interviewed on March 27, 2000, and [REDACTED] was found ineligible to adjust status on December 18, 2000 because of his prior conviction; both the I-485 and the I-601 were denied. *District Director Decision, 2000*. On March 8, 2002, he filed a second Form I-485 (*Form I-485, 2002*) after his conviction had been vacated by a Circuit Court Judge, Palm Beach County, Florida. *Order Granting Unopposed Motion for Post-Conviction Relief (Court Order)*, May 7, 2001. After another adjustment interview, conducted August 6, 2002, the District Director issued a Notice of Intent to Deny (the adjustment application) on September 17, 2002. *Intent to Deny, 2002*. The Intent to Deny indicated that the applicant could file a request for a waiver of inadmissibility and that the applicant had been found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for “seeking to procure an immigration benefit by fraud and misrepresentation.” *Id.* The District Director based this conclusion on his finding that [REDACTED] had lied about being arrested during his March 27, 2000 adjustment interview. *Id.* In response to the Intent to Deny, [REDACTED] filed another Application for Waiver of Ground of Admissibility on October 30, 2002 (*I-601, 2002*) seeking a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i), and explaining at length that he had previously filed two Forms I-485 and a Form I-601, in which he had admitted to his prior arrest and conviction, sought a waiver for this conduct and then provided evidence that the conviction had been vacated. *Letter from Counsel, [REDACTED] in Support of I-601*, filed with attachments, October 28, 2002. Counsel noted that [REDACTED] had been petitioning for lawful permanent residence since 1998 and had provided details regarding his arrest and conviction in his applications and supporting documents in order to overcome the relevant ground of inadmissibility based on that conviction; his comments at his interview on March 27, 2000, therefore, could not logically have been meant to cover up an event that he had so clearly documented in his applications. *Id.*

It is important to note that, based on a prior relationship and approved Petition for Alien Relative, the applicant had filed a previous Application to Adjust Status in 1988; it was denied in 1990 because of the applicant’s ineligibility to adjust for having been convicted of a crime involving a controlled substance. It is

relevant to the current appeal because the I-485 is included in the record, the denial was based on the same conviction currently at issue, and the applicant explained at the time he signed the application (June 14, 1988) and at the time of appearance before an Immigration and Naturalization Service officer (October 7, 1988) that he had committed the offense of "attempt possession of drugs" in 1987, for which he paid a fine. He added that he was "treated for cocaine in the West Palm Beach Institute for one month, now I am fine." *Form I-485, 1988.*

The District Director's Decision denying the 2002 request for a waiver (I-601, 2002) was issued on April 30, 2004 and concluded that the applicant was "inadmissible Pursuant to Sections 212(a)(1)(A)(iv) Drug Abuse or drug addict, 212(a)(2)(A)(i)(II) Controlled substance violation which includes United States and foreign laws and 212(a)(6)(C)(i) willful misrepresentation of a material fact." *District Director Decision, 2004.* Although the decision includes relevant portions of the Act and case law regarding "extreme hardship," it does not consider the evidence of hardship submitted by the applicant in support of his request for a waiver. *Id.* The decision concludes, "Your application for the I-601 waiver is hereby denied in the exercise of discretion. This decision is based solely on the interview, your answer to pertinent questions and your arrest." *Id.*, p.6.

The AAO notes that the District Director's Decision does not elaborate on or provide any supporting evidence for the conclusion that section 212(a)(1)(A)(iv) of the Act, listed as one of the grounds of inadmissibility for [REDACTED] is relevant to this case. To be inadmissible under section 212(a)(1)(A)(iv), an individual must be "determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict." As there is no evidence in the record that any such determination has been made in this case, or indeed that such a determination is at issue in this case, the AAO finds that section 212(a)(1)(A)(iv) of the Act is inapplicable to this case. This decision will address the two remaining grounds of inadmissibility.

On appeal, counsel for the applicant states that the District Director's Decision is unconstitutional in light of due process violations, including the release of confidential medical records to an officer of the U.S. Citizenship and Immigration Services (CIS) and biased statements made by the CIS officer during the applicant's March 27, 2000 adjustment interview. *Notice of Appeal to the Administrative Appeals Office (AAO) (Form I-290B)*, filed May 27, 2004, Attachment, p.1. Counsel also states that as the District Director indicated that the decision to deny the I-601 waiver is based "solely on the interview," failure to provide access to the interview notes so that the applicant can examine the evidence being used against him amounts to the use of "hearsay whose 'admission would be fundamentally unfair.'" *Id.*, citing *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988). These allegations of due process violations are serious, but they fall outside the jurisdiction of the AAO.<sup>1</sup> The AAO understands that counsel has contacted the CIS Office of the Ombudsman regarding this case.

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<sup>1</sup> Counsel also asserts that CIS failed to issue a decision on the applicant's I-485 filed on March 8, 2002. See Appeal Brief, dated June 23, 2004. The AAO notes that an application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). As the final determination on the I-485 application is dependent on the waiver application, which is the subject of this appeal, Mr. Roberts' application for admission is still pending.

On appeal, counsel requests oral argument. The regulation at 8 C.F.R. § 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. CIS has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, the request is denied.

Counsel also asserts on appeal (1) that the applicant is not inadmissible for his prior conviction because it was “judicially vacated because of legal error,” stating that it was vacated by court order on March 7, 2002, “based on a successful Rule 3.172(c)(8) Motion filed by [REDACTED] criminal attorney”; and (2) that the District Director’s Decision failed to consider non-economic factors in reaching a conclusion regarding “extreme hardship.” *Form I-290B*, Attachment, p.4. To support the assertion regarding the vacated conviction, counsel submits an article which explains, *inter alia*, the requirements of Florida Rules of Criminal Procedure (Fla. R. Crim. P.), Rule 3.172(c)(8). Robert G. Amsel, *Avoiding Deportation by Vacating State Court Convictions*, 78 Fla. B.J. 43 (Feb. 2004).

In addition to documents submitted on appeal, the record contains prior filings, briefs, and attachments to support [REDACTED]’s assertions that his wife and child and two step-sons would suffer extreme hardship if [REDACTED] were not allowed to reside in the United States with them. These include financial records showing that he and his wife have a mortgage on their home, tax forms and employment records indicating that [REDACTED] has been employed for the same construction company for over 15 years and his wife has been employed as a clinical esthetician since 1994; affidavits and photographs indicating that he helps care for a son from a prior marriage who is disabled; affidavits attesting to [REDACTED]’s good character, and country conditions reports on the Bahamas indicating economic and social problems there. The record also contains information about [REDACTED]’s criminal conviction, including the Palm Beach County Circuit Court Criminal History Report indicating that the applicant plead guilty to and was convicted of attempted possession of cocaine in 1987, for which he received a fine of approximately \$100; and the 2001 Court Order vacating the conviction, *supra*.

The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. The entire record was considered in arriving at a decision on this appeal.

Inadmissibility for fraud or willfully misrepresenting a material fact

Section 212(a)(6)(C)(i) of the Act provides:

In general.—Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides:

(1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien . . . .

The district director concluded that during his adjustment interview on March 27, 2000, [REDACTED] lied to the interviewing officer, stating:

You denied to him of having previously being [sic] arrested for any crime. You further denied that you had not [sic] been arrested for a cocaine offense.”

. . . .

You, at the time of the interview, were very much aware that you had been previously arrested and pled guilty to attempted possession of cocaine on December 27, 1987. You stated that you were NOT the individual with the drug problem, it was your sister who had the drug problem and you were trying to protect her from your father. You further stated that you spent time in a drug recovery unit in the United States for a drug related problem, which you claim not to have [sic]. [The] Officer [] denied your case based on your arrest history and the fact that you attempted to willfully misrepresent a material fact.

*District Director's Decision, 2004, Part I.* The record reflects, however, that [REDACTED] has consistently and repeatedly admitted that he was arrested and convicted of attempted possession of cocaine on December 27, 1987. In fact, it is that very conviction that has been the primary issue that he has confronted in his applications to CIS. As summarized above, since his first application for adjustment of status in 1988, and throughout the process of seeking to become a lawful permanent resident, on every application, both for adjustment and for a waiver of inadmissibility, he has included information about his conviction and submitted supporting documentation, including the court report of his criminal history and the subsequent order of the Palm Beach County Circuit Court vacating the conviction. As noted by counsel, it would serve no purpose for him to deny such a well documented fact.

Regarding what transpired during the March 27, 2000 adjustment interview, after that interview the District Director's Decision (*District Director Decision, 2000*) found [REDACTED] ineligible to adjust status because of his prior conviction and denied both the I-485 and the I-601; in that decision, there was no reference to any misrepresentation. Inadmissibility based on any misrepresentation made during the March 27, 2000 interview was first raised after the applicant obtained the Court Order vacating his conviction, after he filed a second Form I-485 (*Form I-485, 2002*) and had a second adjustment interview, conducted August 6, 2002. *Intent to Deny, 2002.* The only evidence in the record of misrepresentation is an "Interview Summary" noting the applicant's name, the date of the interview as March 27, 2000 and stating in its entirety:

Applicant stated under oath at interview that he had never used cocaine in his life. Applicant went through drug rehab in the Bahamas for cocaine addiction. Attorney filed 601 – no appeal for cocaine conviction. Write denial.

The Interview Summary is not signed or dated. [REDACTED] indicated in his first I-485, filed in 1988, that he had been “treated for cocaine” at the West Palm Beach Institute for one month. There is no evidence of other treatment, and the reference to the Bahamas in the Interview Summary appears to have been made in error. Whether [REDACTED] used cocaine is not an issue in this case; nor is the issue of whether or where he may have sought treatment for drug use. The issue in this case is whether he was convicted of attempted possession of cocaine and whether he attempted through fraud or willful misrepresentation to cover up that fact. There is ample evidence in the record that [REDACTED] has been forthcoming about his prior conviction and has never attempted to cover up that fact. Regardless of whether he fully disclosed the details of prior drug treatment or usage, and the record is certainly not clear on that issue, such details are immaterial, as it is the conviction itself that serves as the basis of inadmissibility. *See, e.g., Matter of S- & B-C*, 9 I&N Dec. 436 (BIA 1960) (determination of materiality is a fact which would make the applicant excludable or shut off a line of inquiry which may have resulted in exclusion); *Kungys v. U.S.*, 485 U.S. 759 (1988) (materiality is a legal question of whether “misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.”). Based on the record, the AAO finds that the applicant did not misrepresent a material fact and is not inadmissible under section 212(a)(6)(C) of the Act. The waiver filed pursuant to section 212(i) of the Act is therefore moot.

Inadmissibility for conviction of a crime involving a controlled substance

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

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 –

(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 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 (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible (emphasis added).

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

The Attorney General [now Secretary, Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or 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 (emphasis added) if

(1) . . .

(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 [now the Secretary of Homeland Security (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.

The record reflects that [REDACTED] plead guilty and was convicted of attempted possession of cocaine on December 21, 1987, for which he was fined approximately \$100. This conviction was vacated by court order on May 7, 2001. The applicant contends that he is not inadmissible for this conviction because it was vacated. The Act provides for no waiver of this ground of inadmissibility.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

[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.

In general, state actions that expunge or otherwise remove a guilty plea or conviction by operation of a state rehabilitative statute will have no effect in immigration proceedings. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), vacated *sub nom* in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000).<sup>2</sup> In *Roldan*, the BIA found that “[s]tate rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes.” *Id.* at 528. In [REDACTED] case, the Court Order vacating his conviction gives no indication of the reason for the Order, noting simply that the issue came before the court “upon the Defendant’s Unopposed Motion for Post-Conviction Relief.” The underlying Motion is not included in the record.

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<sup>2</sup> In the Ninth Circuit, “if (a) person’s crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation.” *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000). There is no requirement that there be a procedural or substantive defect in the underlying criminal proceeding.

██████████ counsel asserts on appeal that the conviction was “judicially vacated because of legal error,” and that the Court Order was “based on a successful Rule 3.172(c)(8) Motion filed by ██████████ criminal attorney.”

Rule 3.172(c)(8) of the Florida Rules of Criminal Procedure (Fla. R. Crim. P.) provides in pertinent part:

[I]f [a defendant] pleads guilty or *nolo contendere* the trial judge must inform him or her that, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service [now CIS]. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases.

This requirement became effective January 1, 1989. See Amsel, *Avoiding Deportation by Vacating State Court Convictions*, *supra*, p. 43 (citation omitted). For pleas that were taken prior to that date, as in ██████████ case, a defendant who did not receive a deportation warning may get relief only if his counsel had advised him that there would be no deportation consequences of the plea. *Id.*, p. 44 (citation omitted).

In this case there is no evidence that the Court Order vacating ██████████ conviction was issued pursuant to Rule 3.172(c)(8). There is no evidence that the conviction was vacated for other legal defect and no way to determine whether it was vacated for immigration purposes. Absent any reference in the Court Order to the statutory basis for vacating the conviction, and absent a copy of the Motion that was granted, it is not possible to determine whether the conviction was vacated “on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding” and thus whether the Court Order has any effect in determining whether ██████████ is considered convicted for immigration purposes. *Matter of Roldan*, *supra*, at 528.

The vacation of the conviction must be for a procedural or substantive defect in the underlying criminal proceeding and not for reasons related solely to post-conviction events such as rehabilitation or immigration hardship. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Though a guilty plea is a conviction for immigration purposes, some states, including Florida, where this case arises, require the court to advise defendants of the immigration consequences before a plea, and if they are not advised, the conviction may be vacated. In this case, however, there is no evidence in the record to establish that the Court Order to vacate ██████████ conviction was based on such “legal defect,” as alleged by counsel. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Absent evidence to the contrary, ██████████ conviction of December 27, 1987, although vacated by Court Order, remains a conviction for immigration purposes. Based on the record, the AAO finds that the applicant is inadmissible under section 212(a)(2)(i)(II) of the Act due to his conviction of a crime involving a

controlled substance. As there is no waiver in the Act for this ground of inadmissibility, his application for a waiver under section 212(h) of the Act is moot.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether he has established extreme hardship to his U.S. citizen wife or children or whether he merits the waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

**ORDER:** The appeal is dismissed.