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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: MIAMI, FLORIDA

Date:

MAY 11 2010

IN RE:

Applicant:

[REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Honduras who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

The AAO will first address the finding of inadmissibility. Section 212(a)(2)(A) of the Act states, in pertinent parts:

(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.

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.

The Board of Immigration Appeals (BIA) has “observed that moral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one’s fellow man or society in general.” *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992). In order to determine whether a conviction involves moral turpitude, the decision-maker must “look first to statute of conviction rather than to the specific facts of the alien’s crime.” *Matter of Silva-Trevino*, 24 I&N Dec. 687, 688 (A.G. 2008).

The record reflects that in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, the applicant was charged with and pled guilty to count 1, false and fraudulent insurance claims in violation of section 817.234(1) of the Florida Statutes; and count 3, third-degree grand theft in violation of section 812.014(2)(c) of the Florida Statutes. The plea agreement reflects that the judge accepted the applicant’s guilty plea and withheld adjudication, and sentenced her to four

years of reporting probation and ordered that she make restitution. The plea agreement provided that once all of the conditions of the plea agreement were complied with and the applicant had cooperated with the State of Florida Fraud Investigator, the state would at the end of the probationary period agree upon motion by the applicant to vacate the plea and announce a *Nolle Prose* for counts 1 and 3. On April 26, 2007, the court vacated the withholding of the finding of guilt and the plea, the probation, and the court cost previously entered on January 21, 2005.

Counsel does not dispute that the applicant was convicted of committing crimes involving moral turpitude. Counsel contends that because her convictions were vacated and set aside pursuant to a plea agreement, she no longer has any conviction for purposes of immigration law. Counsel cites *In re Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), to show that a sentence may be vacated for any reason, even to avoid immigration consequences, and the vacatur must be given full faith and credit for immigration purposes. Counsel also cites *In re Song*, 23 I&N Dec. 173 (BIA 2001), to demonstrate that a conviction can be vacated and the underlying crime dismissed as a procedural matter.

We find that *Cota-Vargas* and *Song* are not persuasive in supporting counsel's assertion that the state's action of vacating and setting aside the applicant's offenses should be given effect for immigration purposes. In *Cota-Vargas* and *Song* the BIA analyzed the effect of a state's modification of a sentence of imprisonment under subparagraph (B) of section 101 (a)(48) of the Act. See 23 I&N Dec. at 851-52. The issue here is different from the one addressed in *Cota-Vargas* and *Song*. We are not dealing with a judge's modification of a sentence of imprisonment under subparagraph (B) of section 101 (a)(48) of the Act. We are addressing the judge's vacating and setting aside the applicant's conviction under subparagraph (A) of section 101(a)(48) of the Act. Furthermore, whether a vacated conviction remains a conviction under section 101(a)(48)(A) of the Act was addressed by the Eleventh Circuit Court of Appeals, the jurisdiction in which the instant case arises, in *Ali v. U.S. Attorney General*, 443 F.3d 804, 810-12 (11th Cir. 2006). In *Ali*, the Court stated that:

[I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A). If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes.

Id. at 810 (citing *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003)). The Court further stated that in determining why a court vacated a conviction three factors must be considered: the law under which the state court issued its order, the terms of the order itself, and the respondent's reasons in requesting the vacation of the conviction. *Id.* The Court concluded that *Ali* was still convicted for purposes of immigration law because nothing in the extraordinary motion for a new trial, the *nolle prose* motion, or the Superior Court's orders indicated that his conviction was vacated based on a procedural or substantive defect in the underlying proceedings. *Id.* at 810-811.

The reasoning in *Ali* is applicable here. The evidence in the record, which consists of the plea agreement and the court's order to vacate the conviction, is insufficient to establish that the applicant's conviction was vacated due to a procedural or substantive defect in the underlying

proceedings. We note that the applicant did not submit into the record the motion filed to set aside her guilty plea. Thus, the AAO finds that even though the offenses of which the applicant was convicted were vacated and set aside, for purposes of immigration law the applicant is still convicted of crimes involving moral turpitude, rendering her inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

...

(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 [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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's naturalized citizen spouse. The qualifying relative here is the applicant's naturalized citizen spouse and his stepchildren. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship a qualifying relative pursuant to section 212(i) of the Act. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the

combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Extreme hardship to the applicant’s spouse must be established in the event that he remains in the United States without the applicant, and alternatively, if he joins the applicant to live in Honduras. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

There is no claim made on appeal that the applicant’s spouse will experience extreme hardship if he remains in the United States without her or if he joins her to live in Honduras. Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.