

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

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



U.S. Citizenship  
and Immigration  
Services



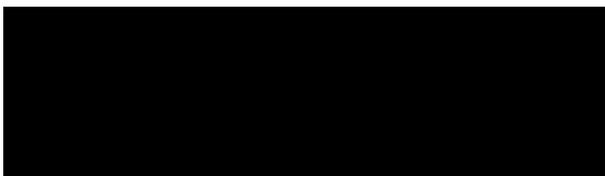
H2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 28 2011

IN RE: [REDACTED]

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

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.

Thank you,

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). A motion to reopen is now before the AAO. The motion will be granted. The previous decision will be affirmed and the waiver application denied.

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States under 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 committed a crime involving moral turpitude. The applicant is the father of three U.S. citizens. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The Director concluded that the record did not establish that the bar to the applicant's admission would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Director's Decision*, dated December 21, 2006. The AAO reached this same conclusion following its review of the record and dismissed the applicant's appeal. *Acting Chief's Decision*, dated June 8, 2009.

On motion, counsel states that the conviction for Attempted Aggravated Assault that previously barred the applicant's admission to the United States has been vacated as a result of the trial court's failure to inform him of the potential immigration consequences of that conviction. *Form I-290B, Notice of Appeal or Motion*, dated June 24, 2009.

In the present case, the record reflects that the applicant pled nolo contendere to Misdemeanor Battery under Florida Statutes § 784.03(1) and to Attempted Aggravated Assault under Florida Statutes §§ 777.04 and 784.021 in the Circuit/County Court, In and For Broward County, Florida on June 5, 1997. Counsel now asserts that the applicant's conviction for Attempted Aggravated Assault, which barred his admission to the United States, has been vacated as a result of the court's failure to advise him of its immigration consequences. He submits a copy of a June 11, 2009 Circuit Court Disposition Order In and For Broward County, Florida relating to the applicant's 1997 convictions for Battery and Attempted Aggravated Assault, which indicates the disposition for both charges as nolle prosequi.

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 that 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. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). Accordingly, to establish that his conviction has been vacated for immigration purposes, the applicant must prove that in expunging his plea the Broward County Circuit Court acted to correct a procedural or substantive defect in its proceedings.

The AAO notes that in *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), the Board of Immigration Appeals (BIA) held that an Ohio conviction vacated for the failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea was no longer a valid conviction for immigration purposes. While counsel claims that these same circumstances form the basis for the expungement of the applicant's conviction by the Broward County Circuit Court, the submitted order does not explain the court's action and no other documentation in the record provides insight into the court's reasoning. Without documentary evidence, counsel's statement is insufficient proof that the applicant's conviction has been vacated for a procedural or substantive defect in his trial. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. 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).

The AAO notes that counsel references *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) in support of his assertions and agrees that its holdings support counsel's assertion that a conviction vacated on the basis of a procedural or substantive defect is eliminated for immigration purposes. However, as just noted, the record in the present matter does not document the basis for the Circuit Court's expungement of the applicant's conviction. Relying on the reasoning in *Pickering*, the AAO must conclude that the applicant remains "convicted" within the meaning of section 101(a)(48)(A) of the Act based on his June 5, 1997 plea of nolo contendere to Attempted Aggravated Assault under Florida Statutes §§ 777.04 and 784.021 as he has failed to document his claim that his conviction was expunged based on the trial court's failure to inform him of the immigration consequences of his nolo contendere plea.

In that no additional evidence has been submitted in support of the applicant's claim that his children, particularly his two younger children, would experience extreme hardship if the Form I-601 application is denied, the AAO will not again consider whether the record demonstrates the applicant's eligibility for a waiver under section 212(h) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the prior decision of the AAO will be affirmed and the application will be denied.

**ORDER:** The prior decision of the AAO is affirmed and the application is denied.