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



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

H2

FILE:

[REDACTED]

Office: CHICAGO

Date: JUN 07 2011

IN RE:

Applicant:

[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:

[REDACTED]

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,

A handwritten signature in cursive script that reads "Michael Shumway".

f. Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the Field Office Director will be withdrawn and the application declared moot. The matter will be returned to the Field Office Director for continued processing.

The applicant is a native and citizen of Pakistan. The director stated that the applicant was inadmissible 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 been convicted of committing crimes involving moral turpitude. The director indicated that 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 his 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.

On appeal, counsel states that on December 2, 2008, the Twenty-Second Judicial Circuit Court in McHenry County, Illinois, vacated the judgment and order of conviction for retail theft entered on November 28, 2006, and amended the charge to disorderly conduct in violation of 720 ILCS 5/26-1. Further, counsel indicates that a motion was filed on June 18, 2009 to withdraw the guilty plea and vacate paragraphs 2 to 4 of the order entered on December 2, 2008. Counsel states that in consequence of that motion the court entered an order on December 3, 2009 in which it vacated the applicant's pleas of guilty to retail theft and disorderly conduct, and granted the state's motion to "nolle pros." Counsel argues that section 212(a)(2)(A)(ii)(II) of the Act applies because the applicant has only one retail theft conviction.

The AAO will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

The applicant has two retail theft convictions. On February 17, 2004, the applicant pled guilty to and was found guilty of violation of 720 ILCS 5/16A-3(A). The applicant was sentenced to serve three days of community service and one year of court supervision. On November 28, 2006, the applicant pled guilty to violation of 720 ILCS 5/16A-3(A). The judge withheld disposition, and the applicant was sentenced to supervision and ordered to pay a fine, costs, and fees.

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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before

the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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.

Counsel does not dispute that the crimes of which the applicant was convicted involve moral turpitude. However, counsel contends that the applicant is no longer inadmissible under section 212(a)(2)(A) of the Act on the basis of the state court’s vacation of the applicant’s November 28, 2006 conviction, and the applicant’s eligibility for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act. We agree for the reasons set forth in this decision.

On December 2, 2008, the state court ordered, based on the applicant’s motion for relief from judgment pursuant to 735 ILCS 5/2-1401, the following: (1) the judgment entered on November 28, 2006 for theft is vacated *instanter*; (2) the theft charge is amended to the charge of disorderly conduct under 720 ILCS 5/26-1; (3) the applicant enters a guilty plea to the amended charge; and (4) the applicant is resentenced to court supervision to be termed *instanter* with credit for the previous fines and costs.

On June 18, 2009, counsel filed a motion to vacate part of the order entered on December 2, 2008. In essence, the motion states that the applicant pled guilty to disorderly conduct, even though the applicant was not charged with that offense on November 28, 2006; that the state court failed to advise the applicant in accordance with 725 ILCS 5/113-8 of the immigration consequences of his guilty plea to the charge of disorderly conduct; and if the applicant had had that advisement he would not have pled guilty.

Based on the motion, the state court ordered that the applicant’s pleas of guilty be vacated and granted the state’s motion to *nolle pros*.

In *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), the Board of Immigration Appeals (Board) held that 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. In *Matter of Pickering*, the Board reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

Based on the record, the AAO finds that the court ordered that the applicant’s pleas of guilty be vacated and granted the state’s motion to nolle pros for reasons related to a procedural defect in the underlying criminal proceedings. We therefore find that the court’s vacation of the November 28, 2006 conviction for retail theft eliminates the conviction for immigration purposes.

The applicant’s February 17, 2004 conviction for retail theft offense qualifies for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act. This exception applies where the maximum penalty possible for the crime of which the alien was convicted did not exceed imprisonment for one year, and the alien was not sentenced to a term of imprisonment in excess of 6 months. 720 ILCS 5/16A-10 provides that “retail theft of property, the full retail value of which does not exceed \$300, is a Class A misdemeanor.” The term “misdemeanor” is defined under 720 ILCS 5/2-11 as “any offense for which a sentence to a term of imprisonment in other than a penitentiary for less than one year may be imposed.” The record shows the applicant was convicted of misdemeanor retail theft and sentenced to serve three days community service and one year of court supervision. Therefore, the applicant’s offense qualifies for the petty offense exception and the applicant is therefore not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act is moot. Accordingly, the decision of the Field Office Director is withdrawn, the waiver application declared moot, and the appeal dismissed.

**ORDER:** The decision of the Field Office Director is withdrawn, the waiver application declared moot, and the appeal dismissed. The matter will be return to the Field Office Director for continued processing of the applicant’s Form I-485.