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



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: MIAMI, FL

Date:

MAR 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:

[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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office 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 Cuba 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 crimes involving moral turpitude. The applicant is married to a lawful permanent resident and has two U.S. citizen children and a U.S. citizen father. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

In a decision, dated September 27, 2010, the field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of Burglary of an Unoccupied Structure and Grand Theft. The field office director found that the applicant had failed to show that his spouse and/or children would suffer extreme hardship as a result of his inadmissibility. The application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated October 25, 2010, counsel states that the evidence in the record supports a finding that the applicant's spouse, children, father, and step-son would suffer extreme hardship as a result of his inadmissibility.

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

- (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) A violation (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.

The record indicates that in addition to the applicant's convictions for burglary of an unoccupied structure and grand theft, the applicant was also convicted of possession of cocaine, resisting an officer with violence, and battery on a law enforcement officer.

The record indicates that on May 9, 1996 the applicant pled guilty to possession of cocaine, resisting an officer with violence, and battery on a law enforcement officer. Upon pleading guilty, adjudication was withheld, and the applicant was placed on one year probation.

The AAO finds that the applicant's conviction for possession of cocaine makes him inadmissible under section 212(a)(2)(A)(i)(II) of the Act for violating a law related to a controlled substance. The AAO notes that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The AAO acknowledges counsel's assertions that the applicant was not convicted of the 1996 offenses because his plea and sentence for the charges have been vacated. However, the AAO finds that the applicant's vacated convictions are still convictions for immigration purposes.

The record includes an Order on Defendant's Motion to Vacate Plea and Sentence, dated June 27, 2008, which states that the plea and sentence entered for the applicant on May 9, 1996 is vacated on the grounds stated in the applicant's Motion to Vacate Plea and Sentence. The AAO notes that although counsel states that the applicant's Motion to Vacate Plea and Sentence was submitted as part of the record, the record does not contain this motion.

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.

Nath v. Gonzales, 467 F.3d 1185 (9th Cir 2006) establishes that a vacated conviction ceases to be a conviction for immigration purposes only if the vacatur is based on a procedural or substantive defect in the underlying criminal proceedings, rather than as a result of the individual's rehabilitation or to avoid immigration consequences. Similarly, under the current statutory definition of "conviction" provided above 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 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.

The AAO has reviewed the record and although counsel states in her letter, dated August 14, 2009, that the vacating of the applicant's convictions was based on constitutional grounds that included legal and substantive defects in the criminal proceedings, the record does not support this statement. Again, the applicant's Motion to Vacate Plea and Sentence is not included in the record. Thus, the AAO finds that the applicant remains "convicted" within the meaning of section 101(a)(48)(A) of the Act and is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a controlled substance violation.

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

The Attorney General 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.)

Section 212(h) of the Act provides a waiver for a 212(a)(2)(A)(i)(II) inadmissibility only where an applicant has been convicted of a single offense of simple possession of 30 grams or less of marijuana. The applicant in the present case has one controlled substance conviction, involving cocaine. Accordingly, no waiver is available to him under the Act.

The AAO notes that because the applicant has been convicted of a law relating to a controlled substance and no waiver is available to him, no purpose would be served in discussing his additional inadmissibility under 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude and whether his qualifying relatives would suffer extreme hardship as a result of this inadmissibility.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.