



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **APR 03 2013** OFFICE: NEWARK, NEW JERSEY

File: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Newark, New Jersey. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The matter is again before the AAO on motion to reopen. The motion will be granted, the matter will be reopened, the prior decision of the AAO will be affirmed, and the application will remain denied.

The applicant is a native of Nigeria and citizen of Canada who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(i)(I), for having been convicted of a crime involving moral turpitude. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse and children.

The field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *See Decision of the Field Office Director*, dated June 18, 2009.

On appeal, the AAO concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, and dismissed the appeal accordingly. *See Decision of the Administrative Appeals Office*, dated April 20, 2012.

On May 18, 2012 counsel for the applicant filed *Form I-290B, Notice of Appeal or Motion* to the AAO. On the Form I-290B, in Part 2, counsel indicated that he was filing a motion to reopen by marking box "D". *See Form I-290B*, received May 18, 2012.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Counsel contends that the applicant no longer requires a waiver of inadmissibility under section 212(h) because his conviction "has been cured" as the result of a final order of expungement issued by the [REDACTED] on March 12, 2010. Counsel articulates a factual and legal basis for the present motion and submits the applicant's verified petition to expunge his record along with a final order of expungement. The AAO finds that the applicant has met the requirements of 8 C.F.R. § 103.5(a)(2), and the motion will be granted and the application will be reopened.

The record has been supplemented on motion with: Form I-290B and counsel's statement thereon; the applicant's petition to expunge his criminal record; and a final order of expungement from the court. The record also contains, but is not limited to: various immigration applications and petitions; tax and employment records for the applicant's family; statements from the applicant and his spouse; a medical letter concerning the applicant's spouse; copies of birth certificates for the applicant's children; and documentation in connection with the applicant's criminal conviction. The entire record was reviewed in rendering a decision on motion.

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).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral 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....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In determining whether a crime involves moral turpitude, the Third Circuit Court of Appeals, per *Jean-Louis v. Holder*, 582 F.3d 462 (3<sup>rd</sup> Cir. 2009), makes a categorical inquiry, which consists of looking “to the elements of the statutory offense . . . to ascertain that least culpable conduct hypothetically necessary to sustain a conviction under the statute.” *Id.* at 465-66. The

“inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute “fits” within the requirements of a CIMT.” *Id.* at 470.

However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other of which are not . . . [an adjudicator] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.” *Id.* at 466. This is true “even where clear sectional divisions do not delineate the statutory variations.” *Id.* In so doing, an adjudicator may only look at the formal record of conviction. *Id.*

The record reflects that on February 19, 1998 the applicant pled guilty and was convicted in the [redacted] for Credit Card Theft, a crime of the fourth degree, in violation of New Jersey Penal Law 2C:21-6(C), for his conduct on or about December 10, 1997. He faced a maximum sentence of 18 months in prison, and was sentenced to two years of probation and ordered to pay monetary fines and costs. Counsel concedes that the applicant has been convicted of a crime involving moral turpitude rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Counsel asserts on motion, however, that the applicant is no longer inadmissible as his conviction has been “cured” as a result of a final order of expungement issued by the court in March 2010, and thus he no longer requires a waiver of inadmissibility. The AAO finds counsel’s assertion unpersuasive.

The AAO finds that expungement under N.J.S.A. 2C:52-1 does not expunge the applicant’s convictions for immigration purposes. 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 which 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. In *Matter of Pickering*, the Board of Immigration Appeals 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). It appears from the record that the expungement of the applicant’s convictions was by a state rehabilitative statute. There is nothing in the record to show that it was based on a defect in the conviction or in the proceedings underlying the conviction. Thus, the applicant remains “convicted” within the meaning of section 101(a)(48)(A) of the Act.

As the basis of counsel’s motion to reopen addresses the expungement of the applicant’s criminal conviction alone, and as no additional issues have been raised or evidence submitted, there are no other issues before the AAO. The applicant has not asserted that the prior analysis of the AAO regarding hardship resulting from denial of the waiver was in error.

(b)(6)

Page 5

In these proceedings, the burden of establishing eligibility for a waiver under section 212(h) of the Act rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden and the application will remain denied.

**ORDER:** The motion is granted, the prior decision of the AAO is affirmed, and the Form I-601 application remains denied.