



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 05 2013

OFFICE: CHICAGO

FILE: [REDACTED]

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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois. The matter is now before the Administrative Appeals Office (AAO) on appeal. As the applicant is not inadmissible, the waiver application will be deemed unnecessary, and the appeal will be dismissed.

The applicant is a native and citizen of Poland 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 committed crimes involving moral turpitude. The applicant 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 with his U.S. citizen spouse.

The Field Office Director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. *Decision of the Field Office Director*, dated December 5, 2011.

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 212(a)(2)(A) of the Act renders inadmissible “any alien convicted of . . . a crime involving moral turpitude.” 8 U.S.C. § 1182(a)(2)(A)(i)(I). The record reflects that the applicant was

convicted on March 26, 2003 of retail theft pursuant to section 720 5/16A-3(A) of the Illinois Criminal Code in the Circuit Court of [REDACTED]. The applicant's motion to withdraw his guilty plea was subsequently granted on May 27, 2010. The applicant's criminal case was stricken with leave to reinstate on July 20, 2010. The applicant was also convicted of attempted retail theft pursuant to section 720 5/16A-3(C) of the Illinois Criminal Code in the Circuit Court of the Eighteenth Judicial Circuit, [REDACTED], Illinois, on October 7, 2008.

The record contains the applicant's motion to withdraw his guilty plea, submitted on May 14, 2010. The applicant alleges in his motion that the court did not address the applicant concerning the terms of his plea agreement, thus failing to comply with Illinois Supreme Court Rule 402(b). The applicant further alleges that his counsel erroneously informed him that a plea of guilty would not result in negative immigration consequences. As noted, the applicant's motion to withdraw his guilty plea was granted by the court on May 27, 2010.

The Board of Immigration Appeals (BIA) has held that the vacation of a plea will vacate the conviction for immigration purposes as long as it was not pursuant to a rehabilitative statute or immigration hardship. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). The Seventh Circuit Court of Appeals has deferred to the BIA's finding that a court's vacation of an alien's conviction for reasons solely related to these factors will result in a convicted alien for immigration purposes. *Ali v. Ashcroft*, 395 F.3d 722 (7th Cir. 2005). The applicant's motion to withdraw his guilty plea was based upon two grounds, the court's failure to comply with procedure and erroneous immigration advice.

The field office director's denial decision states that the applicant's counsel's immigration advice was sound, so that the applicant's conviction appeared to be vacated for immigration purposes. However, the record reflects that the applicant's motion was not solely based upon immigration purposes, as he also cites procedural defects in his plea. Further, even if the court were mistaken in its assessment of the applicant's immigration inadmissibility or failed to acknowledge circuit precedent in its findings, the applicant's motion to withdraw his plea still remains granted.¹ As such, the applicant's 2003 conviction for retail theft, as it was not solely based upon a rehabilitative statute or immigration hardship, is not considered a conviction for immigration purposes. However, this applicant has a remaining 2008 conviction for attempted retail theft.

Section 212(a)(2)(A)(ii)(II) of the Act created an inadmissibility exception to section 212(a)(2)(A)(i)(I) of the Act for an alien's sole conviction where the maximum penalty possible does not exceed imprisonment for one year and the alien is not sentenced to a term of imprisonment in excess of six months. 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Under Illinois penal law,

¹ It is noted that prior to *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Seventh Circuit held that a criminal attorney's failure to advise a defendant of the immigration consequences of a plea did not constitute ineffective assistance of counsel. It is further noted that the holding of *Padilla v. Kentucky* does not apply retroactively to criminal convictions. *See Chaidez v. United States*, No. 11-820. The record does not contain a court order indicating the grounds upon which it relied in granting the applicant's motion to withdraw.

a first conviction for attempted retail theft is a class A misdemeanor, which carries a maximum sentence of one year. The applicant's record of conviction indicates that he was sentenced to community service and court supervision.

Accordingly, the AAO concludes that even if the applicant has been convicted of a crime of moral turpitude that would render him inadmissible section 212(a)(2)(A)(i)(I) of the Act, his conviction is a "petty offense" under the Act's section 212(a)(2)(A)(ii)(II) exception. Therefore, the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, he does not require a waiver pursuant to the present Form I-601 application, and the Field Office Director's decision will be withdrawn.

ORDER: As the applicant is not inadmissible, the waiver application is unnecessary. The Field Office Director's decision is withdrawn, and the appeal is dismissed. The case is returned to the Field Office Director for further proceedings in accordance with this determination.