



U.S. Citizenship
and Immigration
Services

(b)(6)



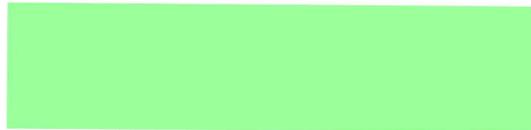
Date: **SEP 09 2014** Office:

VERMONT SERVICE CENTER

FILE:

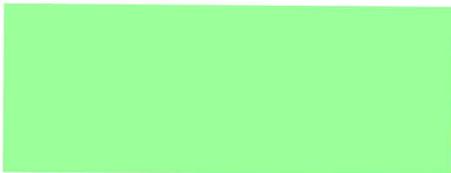


IN RE: PETITIONER:



PETITION: Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:



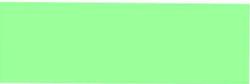
INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office



DISCUSSION: The Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will remain denied.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

Applicable Law

Section 101(a)(15)(U)(i) of the Act provides for U nonimmigrant classification to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion.

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

(2) Criminal and Related Grounds

(A) Conviction of Certain Crimes

(i) In General.-Except as provided in clause (ii), any 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, or

(II) a violation of (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 . . .

* * *

is inadmissible.

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

* * *

(II) the maximum penalty possible for the crime for 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).

* * *

(7) Documentation requirements.-

* * *

(B) Nonimmigrants.-

(i) In general.-Any nonimmigrant who-

- (I) is not in possession of a passport valid for a minimum of six months from the date of the expiration . . .
- (II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

* * *

is inadmissible.

Facts and Procedural History

The petitioner is a native and citizen of Mexico who entered the United States on August 7, 1999 by presenting his border crossing card. The petitioner filed the instant Form I-918 U petition on February 20, 2013, with an accompanying Application for Advance Permission to Enter as Nonimmigrant (Form I-192). On May 7, 2013, the director issued two Requests for Evidence (RFE) noting that the petitioner was inadmissible to the United States, and requesting a statement regarding the petitioner's victimization. Counsel responded to the RFE's with additional evidence. On October 16, 2013, the director found the petitioner's response insufficient to waive his grounds of inadmissibility and denied the Form I-192. The director determined that the petitioner was inadmissible under sections 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude), 212(a)(2)(A)(i)(II) (controlled substance violation), 212(a)(7)(B)(i)(I) (not in possession of a valid passport), and 212(a)(7)(B)(i)(II) (not in possession of a valid nonimmigrant visa or border crossing card) of the Act. The director denied the petitioner's Form I-918 U petition on the same day. Although the director determined that the petitioner was statutorily eligible for U nonimmigrant status, she denied the Form I-918 U petition because the petitioner was inadmissible to the United States and his Form I-192 waiver of inadmissibility was denied. The petitioner, through counsel, timely appealed the denial of the Form I-918 U petition.

On appeal, the petitioner, through counsel, claimed that before a decision was made on the petitioner's Form I-918 U petition, the petitioner's criminal convictions were vacated or reduced, and he is no longer inadmissible to the United States. Counsel indicated that a brief or other evidence will be submitted within 30 days; however, as of the date of this decision, we have received no additional statements or evidence.

Analysis

All nonimmigrants must establish their admissibility to the United States or show that any grounds of inadmissibility have been waived. 8 C.F.R. § 214.1(a)(3)(i). For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 in conjunction with a Form I-918 U petition in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: “There is no appeal of a decision to deny a waiver.” As we do not have jurisdiction to review whether the director properly denied the Form I-192, we do not consider whether approval of the Form I-192 should have been granted. The issue before us is whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

A full review of the record supports the director’s determination that the petitioner is inadmissible under sections 212(a)(7)(B)(i)(I) (not in possession of a valid passport) and 212(a)(7)(B)(i)(II) (not in possession of a valid nonimmigrant visa or border crossing card) of the Act. The petitioner has not submitted evidence that he has a valid passport, nonimmigrant visa or border crossing card. As such, the petitioner is inadmissible under sections 212(a)(7)(B)(i)(I) and 212(a)(7)(B)(i)(II) of the Act.

The director also found the petitioner inadmissible under section 212(a)(2)(A)(i)(II) (controlled substance violation) of the Act. On [REDACTED] 2001, the petitioner was convicted of possession of drug paraphernalia and petit theft, in violation of Idaho Code (I.C.) §§ 37-2734(A) and 18-2403, respectively.¹ On [REDACTED] 2013, the petitioner pled guilty to possession of a controlled substance (marijuana) in violation of I.C. §§ 37-2705, 37-2732(c)(3). On [REDACTED] 2013, the petitioner’s [REDACTED] 2001 convictions for possession of drug paraphernalia and petit theft were vacated by a Magistrate Judge in the [REDACTED] Idaho. On [REDACTED] 2013, the court dismissed the petitioner’s [REDACTED] 2013 plea of guilty for possession of a controlled substance (marijuana).

On [REDACTED] 2002, the petitioner was convicted of possession of drug paraphernalia and petit theft, in violation of I.C. §§ 37-2734(A) and 18-2403, respectively.² On [REDACTED] 2013, the petitioner’s [REDACTED] 2002 convictions were vacated by a Magistrate Judge in the [REDACTED] Idaho.

In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), the Board of Immigration Appeals (Board) found that there is a distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events such as rehabilitation or immigration hardships. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (holding that a conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (reversing *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)). Thus, where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien’s immigration status, the

¹ Criminal case number: [REDACTED]

² Criminal case number: [REDACTED]

court's action does not eliminate the conviction for immigration purposes. *Pickering* at 266. Accordingly, the petitioner must prove that in vacating his guilty pleas, the District Court in [REDACTED], Idaho, acted to correct a procedural or substantive defect in its proceedings. The Orders dated [REDACTED], 2013 and [REDACTED], 2013, indicate that the petitioner entered his guilty pleas "without the benefit of counsel" and he was not aware "of the immigration consequences of his guilty plea(s)." Therefore, the petitioner has established that he is not "convicted" of controlled substance offenses for immigration purposes. Consequently, the petitioner is not inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, for violating a law relating to a controlled substance. This portion of the director's decision will be withdrawn.

In addition, the director found the petitioner inadmissible under section 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude) of the Act. The record shows that on [REDACTED] 2012, the petitioner was convicted of theft-petit, in violation of I.C. § 18-2407(2)³, for which he was sentenced to 180 days incarceration and two years of probation.⁴ The maximum term of imprisonment for a violation of I.C. § 18-2407(2) is not to exceed one year, and the petitioner was sentenced to six months incarceration. Therefore, even if the petitioner's conviction is for a crime involving moral turpitude, his conviction meets the petty offense exception at section 212(a)(2)(A)(ii)(II) of the Act, and the inadmissibility ground at section 212(a)(2)(A)(i)(I) of the Act does not apply to him. Accordingly, this portion of the director's decision is also withdrawn.

On appeal, counsel does not contest the petitioner's grounds of inadmissibility under sections 212(a)(7)(B)(i)(I) and 212(a)(7)(B)(i)(II) of the Act, but instead focuses her assertions on the petitioner's controlled substance convictions being vacated. The director denied the petitioner's application for a waiver of inadmissibility and we have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 U petition. 8 C.F.R. § 212.17(b)(3).

Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Although the petitioner has met the statutory eligibility requirements for U nonimmigrant classification, he has not established that he is admissible to the United States or that his grounds of inadmissibility under sections 212(a)(7)(B)(i)(I) and 212(a)(7)(B)(i)(II) of the Act have been waived. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act, pursuant to 8 C.F.R. § 214.1(a)(3)(i).

ORDER: The appeal is dismissed. The petition remains denied.

³ Under Idaho law, "[a] person steals property and commits theft when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof." Idaho Code § 18-2403(1) (West 2014). Section 18-2407(2) of the Idaho Code provides that a "person is guilty of petit theft when he commits a theft . . . and his actions do not constitute grand theft." (West 2014).

⁴ "Petit theft is a misdemeanor punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding one (1) year or by both." Idaho Code § 18-2408(3) (West 2014).