



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

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 22146325

Date: OCT. 19, 2022

Motion on Administrative Appeals Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant applied for an immigrant visa and seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v). A U.S. Department of State (DOS) consular officer found the Applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having accrued unlawful presence in the United States for one year or more and under section 212(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude (CIMT). The Director of the Nebraska Service Center denied the Form I-601, Application to Waive Inadmissibility Grounds, concluding that although the record established the Applicant's qualifying relative, her U.S. citizen spouse, would experience extreme hardship if the Applicant were denied the waiver, her conviction was for a violent or dangerous crime, and she did not establish exceptional and extremely unusual hardship to overcome this ground of inadmissibility. We dismissed the Applicant's appeal, and the matter is now before us on a motion to reopen and reconsider. Upon review we will grant the motion to reopen and remand the matter to the Director for the entry of a new decision.¹

I. LAW

A motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

The record reflects that following her 2012 guilty plea to a felony charge of abuse, neglect, or endangerment of a child in violation of Nevada Revised Statutes 200.508 the Applicant was sentenced to 12 to 32 months imprisonment with credit for 28 days' time served and three years' probation. In 2013 the Applicant filed a Motion to Withdraw Guilty Plea Agreement and Set Aside the Judgment of Conviction Based upon Breach of Plea Agreement as Negotiated, and the court granted a Motion to Set Aside Guilty Plea Agreement and Judgment of Conviction for Inability to Complete Probation as Negotiated and Related Reasons. The Applicant then pled no contest to two misdemeanor charges

¹ The motion to reconsider is therefore moot and we will not address it further.

of disorderly conduct in violation of [redacted] Nevada, Code 12.33.010 and was sentenced to time served.

The Applicant has argued that she is not inadmissible for a CIMT because she withdrew her guilty plea to a felony charge of abuse, neglect, or endangerment of a child and then pled no contest to two misdemeanor charges of disorderly conduct. She has maintained that because her conviction is now for two misdemeanor charges that are not categorically CIMTs, she is not required to show exceptional and extremely unusual hardship.

In our prior decision, incorporated here by reference, we determined that the Applicant remained convicted for immigration purposes as her conviction was not overturned on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings. We noted that the court granted the Applicant's motion to set aside her guilty plea and conviction but did not specify the reasons. We observed that the record did not clarify whether the Applicant made her motion in writing or orally in court proceedings, and that the Applicant did not submit a copy of a written motion or a transcript where she made a motion orally. We further noted that the Applicant was residing abroad, so DOS makes the final determination concerning visa eligibility and because the consular officer found her inadmissible for a CIMT she requires a waiver. We agreed with the Director's determination that the conviction was for a violent or dangerous crime where the Applicant must establish exceptional and extremely unusual hardship for a discretionary waiver of inadmissibility. On motion, the Applicant reasserts her contention that she is not inadmissible for a CIMT and supplements the record with a court transcript which clarifies that she filed a motion to withdraw her plea pursuant to the U.S. Supreme Court decision *Padilla v. Kentucky*, 559 U.S. 356 (2010), and that the court judge acknowledged the Applicant's assertions and granted the motion.

The Board of Immigration Appeals has held that "a state action that purports to abrogate what would otherwise be considered a conviction, as the result of the application of a state rehabilitative statute, rather than as the result of a procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether [a noncitizen] has been convicted for immigration purposes." *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999). However, in this case the Applicant claimed in her motion to withdraw her guilty plea agreement that prior to her guilty plea to felony charges, she was not properly provided guidance in accordance with *Padilla v. Kentucky*, which held that defense attorneys must inform their clients of the immigration risks of guilty pleas, and that failing to do so constitutes inadequate assistance of counsel. The transcript of the proceedings indicates that the court granted this motion, the plea was vacated, and the Applicant was then convicted on charges of misdemeanor disorderly conduct in violation of a [redacted] ordinance.² Where a court vacates a conviction based on a defect in the underlying criminal proceedings, the foreign national no longer has a "conviction" for immigration purposes. *See Matter of Thompson and Thomas*, 27 I&N Dec. 674 (A.G. 2019) (citing *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), reversed on other grounds, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006)).

² The [redacted] ordinance provides that "[i]t is unlawful for any person to engage in any of the following acts of disorderly conduct: (a) Participate in a fight; (b) Challenge another person to fight; (c) Commit a breach of the peace; (d) Incite a disturbance; (e) Interfere with, annoy, accost or harass any other person which conduct by its nature would tend to incite a disturbance. *See* [https://library.municode.com/nv/\[redacted\]/codes/code_of_ordinances](https://library.municode.com/nv/[redacted]/codes/code_of_ordinances).

As the Applicant's conviction for child abuse and neglect was vacated on grounds relating to a statutory or constitutional violation rather than a state rehabilitative statute, she is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for a conviction for a CIMT. At our request DOS has removed this inadmissibility. The Applicant remains inadmissible under section 212(a)(9)(B)(i)(II) of the Act for accruing unlawful presence in the United States of one year or more. The Director previously found that the Applicant established extreme hardship to her spouse but did not address whether the Applicant warranted a waiver of inadmissibility as a matter of discretion. Accordingly, we will reopen these proceedings and remand the matter to the Director for further proceedings and the entry of a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.