U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: DETROIT, MI Date: MAR 12 2003

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 244(c)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2)(A)(ii)

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ON BEHALF OF APPLICANT: [redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Detroit, Michigan, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the District Director will be affirmed.

The applicant is a native and citizen of Sierra Leone who applied for temporary protected status pursuant to section 244(c)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254(c)(1). The applicant was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having been convicted of a crime of moral turpitude, to wit, the offense of breaking and entering a vehicle and stealing property over $5.00, in violation of Michigan Criminal Law (MCL) section 750.356a. The applicant sought a waiver of these grounds of inadmissibility under section 244(c)(2)(A)(ii) of the Act, 8 U.S.C. § 1254(c)(2)(A)(ii). The statute provides that a waiver may be granted for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

The district director initially approved the applicant's waiver for ground of inadmissibility application. The district director on her own motion then reconsidered her decision to approve the application. The district director subsequently denied the application for a waiver of ground of excludability, on the ground that the applicant was statutorily ineligible for temporary protected status, as an alien convicted of a felony pursuant to section 244(c)(2)(B) of the Act.

On appeal, the applicant, through counsel, asserts that the district director's decision is erroneous as a matter of law and that a waiver is not required. In her argument, counsel states that because the applicant's crime was adjudicated pursuant to juvenile delinquency proceedings, the applicant is not "convicted" for immigration purposes and not inadmissible. Counsel's argument is persuasive.

Section 244(c)(1)(A) of the Act provides:

Aliens Eligible for Temporary Protected Status

(1) In general. - . . . .
(A) Nationals of designated foreign states.— Subject to paragraph (3), an alien, who is a national of a state designated under subsection (b)(1) (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state), meets the requirements of this paragraph only if --
(i) the alien has been continuously

> physically present in the United States since the effective date of the most recent designation of that state;
> (ii) the alien has continuously resided in the United States since such date as the Attorney General may designate;
> (iii) the alien is admissible as an immigrant, except as otherwise provided under paragraph (2)(A), and is not ineligible for temporary protected status under paragraph (2)(B);
> (iv) to the extent and in a manner which the Attorney General establishes, the alien registers for the temporary protected status under this section during a registration period of not less than 180 days.

Sections 244(c)(2) (A) and (B) of the Act provide, in pertinent part:

> (A) Waiver of certain grounds for inadmissibility. - In the determination of an alien's admissibility for purposes of subparagraph (A)(iii) of paragraph (1) -- . . .
> (ii) except as provided in clause (iii), the Attorney General may waive any other provision of section 212(a) in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest; but
> (iii) the Attorney General may not waive -
> (I) paragraphs (2)(A) and 2 (B)(relating to criminals) of such section . . .
>
> (B) Aliens ineligible. - An alien shall not be eligible for temporary protected status under this section if the Attorney General finds that -
> (i) the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States . . . .

A "conviction" for immigration purposes is defined in section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), 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.

The record reflects that on September 23, 1997, the applicant was found guilty of the offense of Breaking and Entering Vehicle - Steal Property Over $5.00, in violation of Michigan Criminal Law (MCL) section 750.356a. The record further reflects that the offense is a felony, punishable by a fine not to exceed $1,000 or by imprisonment in the state prison for not more than five years. The record reflects that the applicant was assigned to youthful trainee status pursuant to the Michigan Holmes Youthful Trainee Act, under MCL section 762.11 et al. (HYTA). The applicant complied with the conditions of his probation pursuant to the HYTA and the felony case against him was dismissed on July 2, 1999.

In its decision, *In re Miguel Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000), the Board of Immigration Appeals (Board) stated, "[w]e have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes." *Devison-Charles* at 1365; *see also Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981) and *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). Importantly, the Board added, "[w]e have also held that the standards established by Congress, as embodied in the FJDA (Federal Juvenile Delinquency Act), govern whether an offense is to be considered an act of delinquency or a crime." *Devison-Charles* at 1365.

> The FJDA defines a 'juvenile' as 'a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday,' and 'juvenile delinquency' as 'the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.

Ramirez-Rivero at 137 (*citing* 18 U.S.C. § 5031). In the applicant's case, the district director found the applicant's punishment constituted a "conviction" for immigration purposes, despite the fact that the applicant was assigned youthful trainee status. The district director's decision emphasized:

> In *Devison* the Board concluded that the New York youthful offender adjudication procedures involved in that case were sufficiently analogous to procedures under the FJDA to classify the procedure as a determination of delinquency, rather than as a conviction for a crime. In coming to this

> conclusion, the Board noted the many procedural similarities, along with some differences, between the FJDA and New York law. *The Board gave particular significance to the fact that in both procedures the original determination of guilt cannot ripen into a conviction. Without this commonality a finding that a youthful offender adjudication in New York constitutes an act of juvenile delinquency could not have been made.*

See District Director's Decision at 2. The district director's decision quoted further that:

> [J]uvenile delinquency and youthful offender adjudications are not akin to expungement or deferred adjudication procedures. Under the former, proceedings are civil in nature and the adjudication of a person determined to be a juvenile delinquent or youthful offender is not a conviction ab initio, ***nor can it ripen into a conviction at a later date.*** In the case of an expungement or deferred adjudication, the judgment in the criminal proceeding either starts out as a "conviction" that can be "expunged" upon satisfactory completion of terms of punishment and petition to the court, or as a judgment that is deferred pending similar satisfaction of conditions of punishment. In either case, however, neither expungement nor deferral can be presumed, and the original judgment of guilt may remain, or ripen into, a "conviction" under state law. ***This is a dispositive difference, because a juvenile adjudication cannot become a conviction based on the occurrence or nonoccurrence of subsequent events.***

District Director's Decision at 2 (*citing Devison-Charles* at 1371, emphasis added). The district director's decision concluded that the applicant's situation was analogous to a deferred judgment and thus a "conviction" for immigration purposes.

> Unlike the New York law and FJDA, under the HYTA assignment to youthful trainee status can ripen into a criminal conviction. In fact, if a court revokes an individual's status as a youthful trainee, the court enters an adjudication of guilt and sentences the individual. MCL 762.12. The individual's guilt has already been determined because he must plead guilty to be assigned to youthful trainee status. MCL 762.11.

District Director's Decision at 3.

Counsel's appeal ("Appeal") essentially asserts that:

> A closer examination of the BIA's comparison of the New York youthful offender statute and the FJDA demonstrates that the BIA is concerned more with protecting the youthful offender status from being labeled a 'conviction' than with magnifying minor differences between state laws and the FJDA.

See Appeal at 3. Counsel asserts that:

> [T]he BIA in *Devison-Charles, supra,* specifically stated that "[t]hey do not consider the specifics of the New York procedure in which a youthful offender is first 'convicted' and then determined to be eligible for youthful offender status to be sufficiently analogous to an 'expungement' to bring it within the scope of *Roldan.*" Likewise, INS should not consider the minor differences between the FJDA and the HYTA, where the youth must first plead guilty to the underlying crime before being placed into youthful trainee status, sufficient to bring it within the scope of *Roldan.* The HYTA is not a rehabilitative statute in which a "conviction" for a crime is later expunged or deferred if the accused successfully completes some rehabilitative procedure. Under HYTA, the accused is not convicted at the inception of the proceedings, nor does the Michigan legislature ever consider that youthful trainee status is a conviction. In this regard, *Matter of Roldan, supra,* is not controlling because the HYTA should not be viewed as a "deferred adjudication" or rehabilitative type of statute. INS should heed the BIA's holding in *Devison-Charles, supra,* that "neither of the holdings [*Roldan, supra,* and *Punu, supra*] nor the text of the 'conviction' definition require a departure from our nearly six decades of precedent decisions holding that juvenile adjudications are not convictions for purposes of federal immigration law."

Id.

MCL section 762.12 states in pertinent part:

> <u>762.12 Revocation of status as youthful trainee; adjudication of guilt; credit against sentence.</u>
>
> Sec. 12. The court of record having jurisdiction over the criminal offense referred to in section 11

> of this chapter may, at any time, terminate its consideration of the individuals as a youthful trainee or, once having assigned the individual to the status of a youthful trainee, may at its discretion revoke that status any time before the individual's final release. . . . Upon termination of consideration or revocation of status as a youthful trainee, the court may enter an adjudication of guilt and proceed as provided by law. If the status of youthful trainee is revoked, an adjudication of guilt is entered, and a sentence is imposed, the court in imposing sentence shall specifically grant credit against the sentence for time served as a youthful trainee in an institutional facility of the department of corrections or in a county jail.

Based on the above provision, the district director concluded that the HYTA is distinguishable from the FJDA, in that, as a matter of law, a disposition under the HYTA can ripen into a conviction.

Upon careful review of the relevant Michigan statutes, this office concludes that the "adjudication of guilt" in the applicant's case qualifies as a "conviction" for a crime and that the district director's decision is correct.

Although MCL 762.12 refers only to an "adjudication of guilt" under the HYTA, MCL 762.14(4) unambiguously refers to and clarifies that an "adjudication of guilt" under MCL 762.12 can be a "conviction." MCL 762.14(4) provides that:

> Unless the court enters **a judgement of conviction against the individual for the criminal offense under section 12 of this chapter**, all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection, but shall be open to the courts of this state, the department of corrections, the department of social services, and law enforcement personnel for use only in the performance of their duties.

MCL 762.14(4) (emphasis added.) Thus, unlike the New York statute at issue in *Devison-Charles*, revocation of youthful trainee status, under the HYTA can actually lead to an adult conviction. A disposition under the HYTA is, therefore, a form of deferred adjudication and not a determination of juvenile delinquency.

The disposition of the criminal charge against the applicant therefore qualifies as a "conviction" for immigration purposes. *See* § 101(a)(48) of the Act, *supra*. Moreover, the

conviction is for a felony. *See* MCL 750.356a (1997). The applicant is thus ineligible for TPS as an alien who is inadmissible and for whom there is no waiver. *See* § 244(c)(2)(A) and (B).

ORDER: The appeal is dismissed and the District Director's decision is affirmed.