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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: NEWARK, NJ Date: JAN 06 2009

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:

This is the decision of the Administrative Appeals Office 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 you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the District Director, Newark, New Jersey. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Portugal 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 been convicted of a crime involving moral turpitude (death by auto). The applicant has a lawful permanent resident spouse and U.S. citizen child. The applicant seeks a waiver of inadmissibility in order to reside with his family in the United States.

The district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *District Director's Decision,* at 4, dated June 8, 2006.

On appeal, counsel asserts that the district director's decision is without merit or fact. *Form I-290B*, received July 7, 2006.

The record includes, but is not limited to, a therapist's evaluation for the applicant's spouse and child, the therapist's follow-up letter, the applicant's spouse's statement, and statements from the applicant's friends and family members. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant was convicted on August 8, 1994 of death by auto under Title 2C, Section 11-5 of the New Jersey Code of Criminal Justice. As such, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

> (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.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> > (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The AAO notes that an application for admission or adjustment is a "continuing" application, adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The date of the decision is the date of the final decision, which in this case, must await the AAO's findings regarding the applicant's eligibility for a waiver of inadmissibility. Therefore, the applicant's Form I-485 remains pending and section 212(h)(1)(A) of the Act applies to the applicant as the activity resulting in the applicant's conviction occurred on May 24, 1992, more than 15 years prior to the applicant's adjustment of status application.

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that his admission to the United States would not be contrary to its national welfare, safety, or security and that he is rehabilitated. The record reflects that the applicant was sentenced to five years probation with the following conditions: 270 days community service, a $2,500 fine, drug and alcohol evaluation, urine monitoring and a probation assessment fee. *Applicant's Judgment of Conviction*, dated October 28, 1994. The applicant was found guilty of violating the terms of his probation on March 13, 1998 and November 12, 1999. *Violation of Probation Orders*, dated March 13, 1998 and November 12, 1999. The November 12, 1999 judgment ordered the applicant to complete 60 days in the Sheriff's Labor Assistance Program (S.L.A.P.) and indicated that completion of this program would result in the defendant being discharged from probation without improvement with all unpaid penalties, fines, assessments and fees to be collected. *Violation of Probation Order*, dated November 12, 1999. The applicant subsequently completed his participation in the S.L.A.P. *Letter from* [redacted] *Supervisor*, dated November 3, 2000. The record indicates that the applicant has paid his fine. *Applicant's Comprehensive Automated Probation System Records*, printed December 7, 2005.

The record reflects that the applicant has not been charged with any additional crimes since his conviction in 1994. The record indicates that the applicant is employed as a project coordinator and has been with his company since April 10, 1995. *Letter from* [redacted] ***President, Dufek Incorporated***, dated February 10, 2006. There is no indication that the applicant has ever relied on

the government for financial assistance. There is no indication that the applicant is or has been involved with any activities that would be contrary to the security of the United States. Therefore, the record evidences that admitting the applicant to the United States would not be contrary to its national welfare, safety, or security and that the applicant is rehabilitated.

The granting of the waiver is discretionary in nature. The favorable factors in this matter include the applicant's lawful permanent resident spouse, U.S. citizen child, hardship to the applicant's spouse and child if he were removed from the United States, and the applicant's good moral character and involvement in his community as established by letters from his local councilman, a vice president of the Portuguese American Police Association, family friends and members of the soccer team coached by the applicant.

The unfavorable factors include the applicant's conviction, two violations of his probation, entry without inspection, unauthorized stay and unauthorized employment. The AAO notes that the applicant applied under section 245(i) of the Act which allows adjustment of status in spite of an entry without inspection, unauthorized stay or unauthorized employment

Based on a thorough review of the record, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.