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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

H₂

[Redacted]

FILE:

[Redacted]

Office: WASHINGTON, D.C

Date: **'APR 05 2011**

IN RE:

Applicant: [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,

A handwritten signature in black ink, appearing to be "Perry Rhew", with a long horizontal line extending to the right.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Washington, D.C., and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I)(II), for having been convicted of a crime relating to a controlled substance. The applicant's spouse, son and stepdaughter are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Field Office Director's Decision*, at 1, dated January 24, 2008.

On appeal, counsel for the applicant asserts that the applicant has shown that qualifying relatives will suffer extreme hardship should the present waiver application be denied. *Brief from Counsel*, dated March 21, 2008.

The record includes, but is not limited to, counsel's brief, the applicant's criminal records, a pastor's letter, letters from the applicant's friends, a letter from an alcohol treatment center, a social worker's report, and the applicant's medical records. The entire record was reviewed and considered in arriving at a decision on the appeal.

The applicant stated that, on April 4, 1994, he was arrested and charged with possession of a concealed weapon and possession of marijuana or marijuana paraphernalia. *Statement from the Applicant*, dated September 15, 2006. He indicated that the amount of marijuana in question consisted of the remains of a single marijuana cigarette, thus it was a very small quantity. *Id.* The federal criminal records reflect that the applicant was arrested in VA, on or around April 9, 1994, for possession of marijuana and a concealed weapon offense. The VA criminal records reflect that the applicant was found guilty of a misdemeanor concealed weapon offense, but it is not clear as to the result of the possession of marijuana offense. Counsel states that the VA state police only release disposition records for convictions and as the records do not mention the outcome of the possession of marijuana arrest, the applicant was never convicted of any marijuana related offense. *Brief in Support of Appeal*, at 1, dated February 10, 2011. In considering the aforementioned statements and records with the preponderance of the evidence standard, the AAO finds that the applicant was convicted in VA of possession of less than 30 grams of marijuana in relation to his arrest on or around April 9, 1994. Therefore, the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act.¹

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

¹ The AAO notes that the applicant's June 22, 1994 concealed weapon conviction in VA and his July 15, 2005 driving under the influence of alcohol conviction in VA are not crimes involving moral turpitude.

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 conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

....

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana 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 . . .

In examining whether the applicant is eligible for a waiver, the AAO will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The record reflects that the activity resulting in the applicant's conviction occurred prior to April 9, 1994. The AAO notes that an application for admission or adjustment of status is considered a "continuing" application and "admissibility is determined on the basis of the facts and the law at the time the application is finally considered." *Matter of Alarcon*, 20 I.&N. Dec. 557, 562 (BIA 1992) (citations omitted). The date of the Form I-485 decision is the date of the final decision, which in this case, must await the AAO's finding regarding the applicant's eligibility for a waiver of inadmissibility. As the activity for which the applicant is inadmissible occurred more than 15 years before the date of his adjustment of status "application", he meets the requirement of section 212(h)(1)(A)(i) of the Act.

The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. The record includes W-2 forms reflecting that the applicant has worked in the United States and federal tax returns for him and his spouse. There is no indication that the applicant has ever relied on the government for financial assistance. Since the applicant's criminal issues in 1994, his only other criminal issue was his July 15, 2005 driving under the influence of alcohol conviction in VA. The record reflects that he successfully completed an alcohol safety program on June 13, 2006. In addition, there is no indication that the applicant is involved with terrorist-related activities. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated per section 212(h)(1)(A)(iii) of the Act. As discussed above, the record reflects that the applicant only has had one conviction since her two convictions in or around 1995. He completed an alcohol safety program on June 13, 2006. There is no evidence that he has been arrested since the time of the aforementioned convictions. The record reflects that he cares for his children. The applicant's pastor states that the applicant is a hard-working man, he has been consistent in his time with the church and it is a privilege to have him as part of the church. *Letter from Dr. J. Douglas Duty, Jr.*, dated January 25, 2011. The record includes letters from friends of the applicant that detail his good moral character. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant has shown that he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

The granting of the waiver is discretionary in nature. The favorable factors include the applicant's U.S. citizen spouse and children, hardship to his family members, filing of tax returns, community involvement through religious activities and engaging in employment.

The unfavorable factors include the applicant's criminal convictions, unauthorized period of stay and unauthorized employment.

Although the applicant's criminal history is serious and cannot be condoned, 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.