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U.S. Citizenship
and Immigration
Services

Date: **JAN 18 2013**

Office: VIENNA, AUSTRIA

FILE: [REDACTED]

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:

SELF-REPRESENTED

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 that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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DISCUSSION: The waiver application was denied by the Field Office Director, Vienna, Austria. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted. The appeal will be sustained and the application approved.

The applicant is a native and citizen of Croatia 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. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife.

The field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated March 11, 2010. The AAO found that the applicant committed a violent or dangerous crime; he established exceptional and extremely unusual hardship to his spouse; and he is ineligible for a waiver as a matter of discretion. *AAO Decision*, dated December 7, 2011. The AAO dismissed the appeal accordingly. *Id.*

On motion, the applicant's spouse asserts that the applicant will not be able to get a driver's license due to his deteriorating eyesight; the applicant is a diabetic amputee; and the applicant no longer drinks alcoholic beverages. *Applicant's Motion*, dated January 3, 2012.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

In support of the motion, the applicant has submitted Florida DMV minimum eyesight requirements and an eye exam report.

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

- (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.

As discussed in its initial decision, the record reflects that, for his conduct on December 12, 1988, the applicant pled guilty to one count of aggravated assault pursuant to Arizona Revised Statutes §§ 13-1203, 1204, 701, 702, 801, and 812. His crime was designated a class 3 felony, and he faced a maximum sentence of five years of incarceration. Arizona Revised Statutes § 13-701(C)(2). He was

sentenced to three years of probation, and then four months of imprisonment after his probation was reinstated.

The AAO found that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude, and he requires a waiver under section 212(h) of the Act.

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

(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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission to the United States is 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).

The AAO found that even if the applicant established that he meets the requirements of section 212(h)(1)(A) or (B) of the Act, it cannot favorably exercise discretion under section 212(h)(2) of the Act in the applicant's case except in an extraordinary circumstance, as he committed a violent or dangerous crime. *See* 8 C.F.R. § 212.7(d).

The regulation at 8 C.F.R. § 212.7(d) provides:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO found that extraordinary circumstances exist in the applicant's case in the form of exceptional and extremely unusual hardship to his spouse. The AAO notes that the finding of exceptional and extremely unusual hardship results in a finding of extreme hardship under section 212(h)(1)(b) of the Act.

However, in determining whether the applicant merits a waiver on an overall matter of discretion, the AAO found that he did not.

The applicant has submitted additional documentation on motion that will be considered in reevaluating whether he should receive a favorable exercise of discretion.

In regard to the applicant's positive factors, the record reflects that his U.S. citizen wife will experience exceptional and extremely unusual hardship should he reside outside the United States. The record does not reflect that the applicant has engaged in criminal activity since 1999, in approximately 13 years. The applicant has submitted an optometrist's letter reflecting that he is diabetic and has cataracts in both eyes; and that the use of bifocals is recommended. There is an indication that he had a leg amputated, his wife asserted that he lacked advanced healthcare in Croatia, and he would benefit from healthcare in the United States. The applicant's wife explained that she and the applicant have no children or other family, and it is evident that they would both benefit physically and emotionally from being reunited.

The applicant's conviction for aggravated assault raises concern due to the violent nature of this crime. However, the offense occurred approximately 24 years ago and the record does not show that

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he has engaged in violent activity at any other time. The AAO is persuaded that the applicant does not have a propensity to commit further violent acts.

In regard to the applicant's negative factors, the record reflects that he has been convicted of crimes, including at least one crime involving moral turpitude. The record shows that the applicant was convicted for driving under the influence of alcohol in 1993, and he was arrested for further driving under the influence offenses on February 9, 1999. The applicant's wife contends that the applicant cannot drink alcohol due to his diabetic condition and that, in fact, he no longer drinks alcohol. She asserts again that he will not be able to drive in the United States as he does not meet the minimum eyesight requirements to obtain a license. On motion, the applicant submits Florida DMV minimum eyesight requirements and an eye exam report. Although we are not convinced that the applicant would be unable to obtain a driver's license in Florida, the record reflects significant visual impairment and strongly suggests, given this impairment, physical condition and age, that the applicant is unlikely to drive and/or to drive while intoxicated, and therefore pose the threat that led us to the conclusion that discretion should not be exercised in his favor.

The AAO finds that the violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO now finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the previous decisions of the field office director and the AAO will be withdrawn and the application will be approved.

ORDER: The motion is granted, the appeal is sustained, and the application is approved.