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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**



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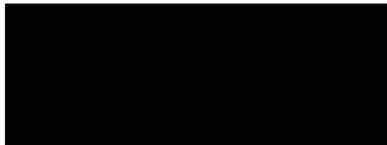
H2

DATE: **JAN 17 2012** Office: PORTLAND, ME FILE:

IN RE: Applicant:

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:



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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, Portland, Maine, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is moot.

The applicant is a native and citizen of Brazil 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 crimes involving moral turpitude. The applicant's spouse and child are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The director concluded that the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the Director*, dated May 15, 2009.

On appeal, counsel asserted that the director's decision was incorrect since the evidence submitted clearly showed extreme hardship to the applicant's U.S. citizen spouse. *Form I-290B*, dated June 12, 2009. Subsequently, counsel submitted correspondence asserting that the applicant's convictions were vacated for substantive reasons, the convictions are no longer valid for immigration purposes and the applicant no longer requires a waiver of inadmissibility. *Brief in Support of Appeal*, dated November 4, 2011.

The record includes, but is not limited to, the applicant's Form I-290B, documents related to his claim of extreme hardship and his criminal documents.

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.

The record reflects that the applicant pled guilty to two counts of attempted larceny by check under Massachusetts General Laws, Chapter 266, Section 37 on July 9, 2007. Counsel states that the applicant's convictions have been vacated due to constitutional reasons. *Brief in Support of Appeal*. The record includes part of a motion to revise and revoke and/or vacate and withdraw plea. In the motion, the applicant requests that his plea to "sufficient facts" be withdrawn and vacated pursuant to Massachusetts General Laws Chapter 278, Section 29D, which states:

The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of

deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.” The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States.

If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

Court notes reflect that on March 31, 2011, the motion to revise and revoke and/or vacate and withdraw plea was allowed and the cases were dismissed. Based on this evidence the AAO finds that the convictions were vacated due to a violation of Massachusetts General Laws Chapter 278, Section 29D.

The Board of Immigration Appeals (BIA) has held that vacation of a plea will vacate the conviction for immigration purposes as long as it was not pursuant to a rehabilitative statute or because of immigration hardship. *See, e.g. Matter of Adamiak*, 23 I. & N. Dec. 878, 879 (BIA 2006)(where the criminal court failed to advise the defendant of the immigration consequences of his plea pursuant to section 2943.031 of the Ohio Revised Code, the subsequent vacatur is not a conviction for immigration purposes because the guilty plea has been vacated as a result of a “defect in the underlying criminal proceedings” and not for a rehabilitative or immigration hardship purpose); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (concluding that in light of the language and legislative purpose of the definition of a “conviction” at section 101(a)(48) of the Act, “there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships”); and *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (according full faith and credit to a New York court's vacation of a conviction under a statute that was neither an expungement nor a rehabilitative statute); *See also, Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999)(under the definition in section 101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate,

discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute).

In this case, the record shows that the applicant's convictions were vacated due to a defect in the underlying criminal proceedings and not pursuant to a rehabilitative statute or because of immigration hardship. Therefore, based on the precedential decisions noted above, the AAO finds that the applicant no longer has convictions for immigration purposes. There are no other convictions for crimes involving moral turpitude in the record. Therefore, the applicant has not been convicted of a crime involving moral turpitude and is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. As such, the waiver application is moot. The appeal will be dismissed.

**ORDER:** The appeal is dismissed as the waiver application is moot.