U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 27806254

Date: JAN. 5, 2024

Appeal of Nebraska Service Center Decision

Form I-601, Application for Waiver of Grounds of Inadmissibility

The Applicant, who has requested an immigrant visa abroad, was found inadmissible to the United States, in part, for having been convicted of a crime involving moral turpitude (CIMT). He seeks a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h).

The Director of the Nebraska Service Center denied the Form I-601, concluding that the Applicant was inadmissible on the above ground and statutorily ineligible for a waiver under section 212(h) of the Act because he was convicted of an aggravated felony after admission to the United States as a lawful permanent resident (LPR). The Director further determined that a waiver was not otherwise warranted in the exercise of discretion. The Director also denied the Applicant's subsequent motion to reopen and reconsider the adverse decision, and the matter is now before us on appeal.

The Applicant asserts that the Director erred in finding him ineligible for the waiver, because none of the offenses of which he was convicted qualifies as an aggravated felony for immigration purposes, and he was not removed from the United States as an aggravated felon. The Applicant also contends that he has demonstrated he merits a waiver in the exercise of discretion.

The Applicant bears the burden of proof to demonstrate eligibility for the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

## I. LAW

Any noncitizen convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a CIMT (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. Section 212(a)(2)(A) of the Act. Noncitizens found inadmissible under section 212(a)(2)(A) of the Act may seek a discretionary waiver of inadmissibility under section 212(h) of the Act.

However, no waiver shall be granted to a noncitizen "who has previously been admitted to the United States as an alien lawfully admitted for permanent residence" if either (1) since the date of such admission the noncitizen has been convicted of an aggravated felony or (2) the noncitizen has not lawfully resided continuously in the United States for a period of at least seven years immediately preceding the date of initiation of proceedings to remove the noncitizen from the United States. Section 212(h)(2) of the Act.

## II. ANALYSIS

The Applicant does not contest the U.S. Department of State's determination of inadmissibility under section 212(a)(2)(A) of the Act.[1] The only issue on appeal is whether the Applicant is eligible for a waiver of inadmissibility under section 212(h) of the Act. We have reviewed the entire record and conclude that he is not.

The record reflects that the Applicant was admitted to the United States as an LPR on January 6, 1996, with an immigrant visa. In [redacted] 2000 he was convicted of criminal possession of a forged instrument in the third degree in violation of New York Penal Law (N.Y. Penal Law) § 170.20. The Applicant was later convicted of other offenses, including petit larceny in violation of N.Y. Penal Law § 155.25, assault in the second degree in violation of N.Y. Penal Law § 120.05, and aggravated unlicensed operation of a motor vehicle in the third degree in violation of New York Vehicle and Traffic Law § 511.1. He was subsequently served with a Form I-862, Notice to Appear in Removal Proceedings Under Section 240 of the Immigration and Nationality Act (NTA). On September 19, 2002, less than seven years after the Applicant's admission to the United States for permanent residence, the former Immigration and Naturalization Service initiated removal proceedings against him by filing the NTA with an Immigration Court. In [redacted] 2002 an Immigration Judge denied the Applicant's requests for asylum and withholding of removal and ordered him removed from the United States to Sri Lanka. The Board of Immigration Appeals (the Board) affirmed that decision in 2003, but subsequently remanded the matter to the Immigration Judge, who ultimately found the Applicant removable from the United States under section 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii), as a noncitizen who at any time after admission was convicted of two or more CIMTs not arising out of a single scheme of criminal misconduct. The Applicant appealed the Immigration Judge's decision, but the Board dismissed the appeal in July 2007 and denied the Applicant's subsequent motions to reopen the proceedings in 2011, 2013, 2018, and 2020.

In his initial appeal brief, the Applicant contended that he was eligible for a waiver of inadmissibility under section 212(h) of the Act because none of the offenses of which he was convicted were aggravated felonies, and asserted that he also merited such waiver in the exercise of discretion.

In November 2023 we issued a notice of intent to dismiss the appeal (NOID), advising the Applicant that regardless of the classification of the offenses[2] he was statutorily barred from a waiver under

[1] Because the Applicant is residing abroad and applying for an immigrant visa, the U.S. Department of State makes a final determination concerning his admissibility and eligibility for such visa. *See* section 104(a) of the Act, 8 U.S.C. § 1104(a); and sections 221(a) and (g) of the Act, 8 U.S.C. § 1201(a) and (g).

[2] We reserved the Applicant's arguments on that issue and did not address them, noting that our reservation of the issue was not a stipulation that he had overcome the grounds for the denial of his waiver request. Rather, we explained that

section 212(h)(2) of the Act, because he was previously admitted to the United States as an LPR, and he had not lawfully resided continuously in the United States for at least seven years immediately preceding the initiation of removal proceedings against him. We gave the Applicant an opportunity to submit additional evidence to rebut our findings pursuant to the regulation at 8 C.F.R. § 103.2(b)(8)(iii).

In response to the NOID, the Applicant avers that the bar in section 212(h)(2) of the Act does not apply to him because he was removed from the United States in 2019 and is no longer an LPR. He states, citing *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013),[3] that while an LPR may request a 212(h) waiver in removal proceedings in conjunction with an application for adjustment of status or a request for admission under section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C), he does not fall within either category because he is no longer an LPR. He further opines that the bar in section 212(h)(2) of the Act has never been interpreted to include former LPRs who are not in removal proceedings and are no longer in the United States. We are not persuaded.

As stated, section 212(h)(2) of the Act specifies, in relevant part, that "[n]o waiver shall be granted . . . in the case of a [noncitizen] who *has previously been admitted to the United States as an alien lawfully admitted for permanent residence* if . . . the [noncitizen] has not lawfully resided continuously in the United States for a period of not less than [seven] years immediately preceding the date of initiation of proceedings to remove the noncitizen from the United States." (Emphasis added). A noncitizen "has previously been admitted to the United States as an alien lawfully admitted for permanent residence" within the meaning of section 212(h)(2) of the Act if they were inspected, admitted, and physically entered the United States as an LPR at any time in the past. *Matter of Vella*, 27 I&N Dec. 138, 140 (BIA 2017) (explaining that "[u]se of 'previously' in Section 212(h) [of the Act] . . . clarifies that the statute does not apply only to noncitizens who were and still are admitted as [lawful permanent residents], but also to those who were at some earlier time admitted as [lawful permanent residents].").

Here, the Applicant has been previously admitted to the United States as an LPR in January 1996, and he did not lawfully reside continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of removal proceedings against him in September 2002. Accordingly, he is subject to the bar in section 212(h)(2) of the Act. Neither the Act nor the corresponding regulations provide an exception to this bar for noncitizens who had lost their LPR status as a result of removal from the United States due to a criminal conviction or convictions. Consequently, the Applicant is not eligible for a waiver of inadmissibility under section 212(h) of the Act.

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because he was ineligible for a waiver on another statutory ground, there was no constructive purpose in determining whether he had been convicted of an aggravated felony, as it would not have changed the outcome.

[3] The Board held in *Matter of Rivas* that the respondent, an LPR who had been convicted of two CIMTs, traveled outside of the United States, was admitted to the United States and then charged as being deportable under section 237(a)(2)(A)(ii) of the Act, was not eligible to apply for a stand-alone waiver under section 212(h) of the Act nunc pro tunc; rather, an LPR charged with deportability could only obtain a 212(h) waiver in connection with an adjustment application. 26 I&N Dec. at 132-33. The Applicant does not explain the relevance of this holding to his assertion that the bar in section 212(h)(2) of the Act does not apply to former LPRs.

The Applicant asserts, in the alternative, that the NTA which the former INS served on him and filed with the Immigration Court was defective and therefore failed to properly initiate the removal proceedings against him. We decline to address this assertion, as we lack authority to review the validity of the NTA and the removal order, or any other issues concerning the Applicant's removal proceedings, which are within the jurisdiction of the Executive Office for Immigration Review.[4]

Lastly, we acknowledge the Applicant's statements that his U.S. spouse is experiencing extreme hardship in his absence, and that his waiver request should be therefore approved in the exercise of discretion. However, we may not grant a waiver under section 212(h) of the Act as a matter of discretion to a noncitizen who does not meet the statutory requirements for such waiver.

## III. CONCLUSION

The Applicant is statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act because he was previously admitted to the United States as an LPR and had not lawfully resided continuously in the United States for at least seven years immediately preceding the initiation of removal proceedings against him. As such, he is permanently barred from obtaining a waiver pursuant to section 212(h)(2) of the Act, and his waiver application remains denied.

**ORDER:** The appeal is dismissed.

[4] *See* The Administrative Appeals Office (AAO), Jurisdiction and Types of Cases, https://www.uscis.gov/about-us/organization/directorates-and-program-offices/the-administrative-appeals-office-aao; *see also* U.S. Department of Justice, Executive Office for Immigration Review, https://www.justice.gov/eoir/about-office. We note that the Applicant raised this issue before the Board on his fourth motion to reopen, asserting that the NTA was not effective because it did not include the date and time of his first removal hearing, and that it therefore did not trigger the stop-time rule for cancellation of removal under section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1). The Board denied the motion in 2020, finding, in part, that the NTA was perfected by the subsequent notice of hearing in 2002, and the amended NTA in 2006 did not negate this perfected service.