U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

PEDURI, DORINA I
1000831531/A071-302-021
ARRENDALE PRISON
PO BOX 709
2023 GAINESVILLE HWY SOUTH
ALTO, GA 30510

DHS/ICE Office of Chief Counsel - ATL
180 Ted Turner Dr., SW, Ste 332
Atlanta, GA 30303

Name: PEDURI, DORINA I

A 071-302-021

Date of this notice: 5/19/2017

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Wendtland, Linda S.
Pauley, Roger

Userteam: Docket

File: A071 302 021 – Atlanta, GA

Date: MAY 19 2017

In re: DORINA I. PEDURI a.k.a. Dorina I. Lockhart

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Philip Barr
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility

On December 14, 2016, an Immigration Judge granted the Department of Homeland Security's motion to pretermit the respondent's request for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), which the respondent sought in conjunction with adjustment of status.[1] The respondent, a lawful permanent resident who is a native and citizen of Moldova, now appeals. The appeal will be sustained. The record will be remanded.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the respondent, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *see also Zhou Hua Zhu v. U.S. Att'y Gen.*, 703 F.3d 1303 (11th Cir. 2013); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including issues of law, judgment or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On January 11, 1995, the respondent entered the United States as a refugee. She subsequently adjusted her status to that of a lawful permanent resident under section 209 of the Act, 8 U.S.C. § 1159. The Immigration Judge found that on May 30, 2012, the respondent was convicted of

[1] The respondent submitted evidence that she filed her adjustment of status application on November 7, 2016 (Exh. 3, Tab EE at 112).

statutory rape and child molestation (I.J. at 1; Exh. 1).[2] After being placed in removal proceedings, the respondent requested a waiver of inadmissibility under section 212(h) of the Act.

Section 212(h) of the Act authorizes the Attorney General to waive inadmissibility for an alien who meets certain requirements. The statute in relevant part precludes application of the waiver in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if since the date of such admission the alien has been convicted of an aggravated felony. Section 212(h) of the Act. The Act defines "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A).

We held in *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015), that an alien who adjusted status in the United States, and who did not enter as a lawful permanent resident, is not precluded from establishing eligibility for a waiver of inadmissibility under section 212(h) of the Act. The United States Court of Appeals for the Eleventh Circuit, under whose jurisdiction this case arises, had previously held similarly. *See Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363 (11th Cir. 2011).

The issue before us is whether the respondent, as an alien who entered as a refugee pursuant to section 207 of the Act, and who later adjusted her status under section 209 of the Act, is one who "has previously been admitted to the United States as an alien lawfully admitted for permanent residence."

The Immigration Judge distinguished the respondent's case from *Matter of J-H-J*, *supra*, and *Lanier v. U.S. Att'y Gen.*, *supra*. Similar to the aliens in those cases, the respondent adjusted her status in the United States. Section 209 of the Act, however, requires an alien who entered as a refugee to return "to the custody of the Department of Homeland Security for inspection and examination for admission to the United States" (I.J. at 3). Section 209(a)(1) of the Act. The Immigration Judge determined that an adjustment under section 209(a)(1), by its plain terms, requires an "admission" (I.J. at 3). Further, the Immigration Judge stated that because under section 209(a)(2) of the Act any alien found to be admissible after "inspection and examination" shall "be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien's arrival into the United States," the respondent was deemed to have been lawfully admitted for permanent residence (I.J. at 3). Thus, the Immigration Judge concluded that the respondent's aggravated felony, which occurred after the respondent had previously been admitted to the United States as an alien lawfully admitted for permanent residence, precluded application of the waiver (I.J. at 3).

In reaching his conclusion the Immigration Judge relied on *Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012), in which the Eighth Circuit held that a refugee who adjusted status under section 209 of the Act was not eligible for a waiver under section 212(h) of the Act for the reasons stated in the prior paragraph (I.J. at 3). The Eighth Circuit, however, was alone among the circuits in deferring to our prior decisions in *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012), and

[2] Although the Immigration Judge and the respondent's Notice to Appear indicated that the conviction occurred on May 30, 2012, the jury verdict in the record reflects the conviction date as February 1, 2012.

Matter of Koljenovic, 25 I&N Dec. 219 (BIA 2010), in which we held that an alien who adjusted status in the United States was not eligible for a waiver of inadmissibility under section 212(h) of the Act. We withdrew from those cases in *Matter of J-H-J-*, *supra*, and adopted the position of nine circuits that section 212(h) of the Act only precludes an alien "who *entered* the United States as a lawful permanent resident from establishing eligibility for the waiver on the basis of an aggravated felony conviction" (Respondent's Br. at 3-4). *Id.* at 565 (emphasis added).

Section 209(a)(2) of the Act deems a refugee who adjusted status under section 209 as having been admitted as a lawful permanent resident since the date of the alien's arrival into the United States. That creation of a legal fiction regarding when the alien was admitted as a lawful permanent resident, however, does not alter the manner in which the alien initially entered the United States. In other words, the statute does not deem an initial entry as a refugee to be a previous admission as a lawful permanent resident (DHS Br. at 4; Respondent's Br. at 4). We hold that the respondent who entered the United States as a refugee and who subsequently adjusted her status under section 209 of the Act is statutorily eligible to apply for a waiver of inadmissibility under section 212(h) of the Act.

We will remand the record for the Immigration Judge to consider the respondent's request for a waiver of inadmissibility under section 212(h) of the Act in conjunction her application for adjustment of status, including whether the respondent merits the waiver as a matter of discretion.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings consistent with this opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
	)	
LOCKHART, Dorina I.	)	**File No. A# 071-302-021**
a/k/a Dorina Peduri	)	
	)	
Respondent	)	
	)	

CHARGE: Section 237(a)(2)(A)(iii) of the Act, as amended, in that, at any time after admission, Respondent has been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act, a law relating Murder, Rape or Sexual Abuse of a Minor.

APPLICATION: Respondent's Application for a Waiver of Inadmissibility under Section 212(h) of the Act.

APPEARANCES

ON BEHALF OF THE RESPONDENT:

Justin W. Chaney, Esq.
Justin W. Chaney, LLC
1801 Peachtree ST NW, Suite 110
Atlanta, Georgia 30309

ON BEHALF OF THE GOVERNMENT:

Office of Chief Counsel
Department of Homeland Security
180 Ted Turner Drive SW, Suite 332
Atlanta, Georgia 30303

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. FACTUAL AND PROCEDURAL HISTORY

Dorina I. Lockhart, also known as Dorina Peduri, ("Respondent") is a female native and citizen of Moldova. On January 11, 1995, she entered the United States as a refugee. She later became a lawful permanent resident under the Refugee Act, Section 209 of the Immigration and Nationality Act ("Act").

On or about May 30, 2012, Respondent was convicted in the Superior Court of Newton County, Georgia for the offenses of Statutory Rape and Child Molestation. For these offenses, she was sentenced to twenty years, fifteen of which were to be served in confinement.

On May 7, 2015, the Department of Homeland Security ("Department") placed Respondent into removal proceedings through the issuance of a Notice to Appear ("NTA"). Exh. 1. The NTA stated that Respondent was subject to removal pursuant to Section 237(a)(2)(A)(iii) of the Act, as amended, in that Respondent has been convicted of an aggravated felony as

defined in Section 101(a)(43)(A) of the Act, a law relating Murder, Rape or Sexual Abuse of a Minor. See id. On November 28, 2016, Respondent admitted all the allegations in the NTA except for being a native and citizen of Moldova and conceded the charge. See Exh. 5. The Court finds that Respondent is a native and citizen of Moldova based on the evidence provided by the Government and based on the fact that Respondent has not shown otherwise. See Exh. 6, Tabs A-E.

On October 27, 2016, Respondent filed an application for a 212(h) waiver with the Court.

The Court has carefully reviewed the entire record before it. All evidence has been considered, even if not specifically discussed further in this decision. For the reasons set forth below, the Court will deny Respondent's application for a Section 212(h) waiver. As Respondent has not identified any other form of relief that she is seeking, the Court will order Respondent removed to Moldova based on the charge of removability.

II. EVIDENTIARY RECORD

Exhibit 1: Notice to Appear (filed May 28, 2015)

Exhibit 2: Respondent's Application for 212(h) Waiver (filed October 27, 2016)

Exhibit 3: Respondent's Supplement to 212(h) Waiver Application (filed November 28, 2016)

Exhibit 4: Respondent's Brief in Support of Eligibility to Apply for 212(h) Waiver (filed November 28, 2016)

Exhibit 5: Respondent's Written Pleadings (filed November 28, 2016)

Exhibit 6: Department of Homeland Security Submission of Evidence, Tabs A–E (filed November 28, 2016)

III. STATEMENT OF LAW AND DISCUSSION

Under Section 212(h) of the Act, the Attorney General may waive inadmissibility for aliens who meet certain requirements. The Attorney General cannot, however, waive inadmissibility "in the case of an alien who has previously been *admitted* to the United States as an alien *lawfully admitted for permanent residence* if . . . since the date of such admission the alien has been convicted of an aggravated felony." INA § 212(h)(emphasis added). "The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A). "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." INA § 101(a)(20).

Aliens who adjust to lawful permanent resident status after being admitted to the United States are eligible to seek a 212(h) waiver. Lanier v. U.S. Att'y. Gen., 631 F.3d 1363 (11th Cir.

2011); Matter of J-H-J-, 26 I&N Dec. 563, 565 (BIA 2015). However, aliens who enter the United States as refugees and then adjust under Section 209 of the Act are deemed to have been lawfully admitted for permanent residence because the date that they adjust reverts back to the date that they entered the United States. INA § 209(a). See Gutnick v. Gonzales, 469 F.3d 683, 684 (7th Cir. 2006), overruled on other grounds, Arobelidze v. Holder, 653 F.3d 513 (7th Cir. 2011) (cited for persuasiveness) (Because adjustment of status by refugee operates retroactively, Respondent was regarded as admitted for lawful permanent residence as of date of arrival in United States.).

Furthermore, Section 209(a)(1)(C) of the Act provides that those adjusting their status under this section "shall ... return ... to the custody of the Department of Homeland Security for inspection and examination for *admission* to the United States." INA § 209(a)(1)(C) (emphasis added). "[Section 209(a)(1)] incorporates the same definitions as section 212(h), so 'admission' under the former is equivalent to 'admission' under the latter." Spacek v. Holder, 688 F.3d 536, 539 (8th Cir. 2012) (cited for persuasiveness). Therefore, an adjustment under section 209(a) requires, by its own language, an "admission." INA § 209(a)(1)(C). Because aliens who adjust under Section 209(a) are admitted as lawful permanent residents, subsequent aggravated felonies disqualify them from seeking 212(h) waivers. See Spacek, 688 F.3d at 539 (Aliens who adjust under Section 209 of the Act are barred from seeking waivers under 212(h) because no matter how Section 212(h) is interpreted throughout the different circuits, Applicants who adjust under Section 209 of the Act are "admitted" as lawful permanent residents under Section 209(a)(1(C)).

Here, Respondent was admitted to the United States as a refugee and then adjusted to lawful permanent resident status under the Refugee Act, Section 209 of the Act. Therefore, she is deemed to have been lawfully admitted for permanent residence because the date of her admission reverts back to her date of entry in the United States and because she was returned to the Department for admission according to Section 209(a)(1)(C). Because Respondent was lawfully admitted for permanent residence and conceded the charge that she committed an aggravated felony involving sexual abuse of a minor, she is ineligible to receive a 212(h) waiver.

IV. CONCLUSION

The Court denies Respondent's application for a waiver of inadmissibility under Section 212(h) of the Act. Respondent is statutorily ineligible for a Section 212(h) waiver as she has been previously admitted as a lawful permanent resident. As there are no other applications of relief before the Court, Respondent is ordered removed to Moldova.

Accordingly, considering all the aforementioned, the Court enters the following orders:

ORDER

It is ordered that:

Department's request to pretermit Respondent's application for a waiver of inadmissibility under section 212(h) of the Act is **GRANTED.**

It is further ordered that:

Respondent shall be **REMOVED** to **MOLDOVA**.

12/14/16
Date

William A. Cassidy
United States Immigration Judge
Atlanta, Georgia