U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: N[redacted], S[redacted]

A[redacted]-992

Date of this notice: 1/8/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

TranC
Userteam: Docket

File: [redacted] 992 – Fort Snelling, MN

Date: JAN – 8 2018

In re: S[redacted] N[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mai Neng Moua, Esquire

ON BEHALF OF DHS: Cassondra Bly
Assistant Chief Counsel

APPLICATION: Waiver of inadmissibility; adjustment of status

The Department of Homeland Security (DHS) appeals from the Immigration Judge's July 28, 2017, decision granting the respondent's application for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), as well as the respondent's application for adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a). The respondent opposes the appeal. The appeal will be dismissed. The record will be remanded for the requisite background checks.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The sole issue on appeal is whether the respondent is precluded from applying for a waiver of inadmissibility under section 212(h) of the Act due to his criminal record, which includes an aggravated felony conviction. Moreover, aside from arguing that the respondent's criminal record precludes him from being eligible to apply for a section 212(h) waiver, the DHS does not meaningfully contest on appeal the merits of the respondent's underlying claim for a section 212(h) waiver and adjustment of status. Those arguments are thus not properly before the Board. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (setting forth that arguments not raised on appeal are waived).

On or about August 28, 1985, the respondent entered the United States as a refugee (IJ at 1; Exh. 1). On October 28, 1986, the respondent adjusted his status to that of lawful permanent resident of the United States pursuant to section 209 of the Act, 8 U.S.C. § 1159 (IJ at 1; Exh. 1). On October 24, 2002, the respondent was convicted of assault in the second degree, in violation of Minnesota Statute § 609.221, subd. 1, and was sentenced to 21 years of incarceration (IJ at 1; Exh. 1). Before the Immigration Judge, the respondent sought adjustment of status based upon his

approved Petitioner for Alien Relative (Form I-130) filed by his United States citizen wife.[1] As noted above, the respondent also filed an application for 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. Such a waiver may not be granted "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. We have held "that section 212(h) of the Act only precludes aliens who entered the United States as lawful permanent residents from establishing eligibility for a waiver on the basis of an aggravated felony conviction." *Matter of J-H-J-*, 26 I&N Dec. 563, 565 (BIA 2015). In so holding, we acknowledged the overwhelming circuit court authority reaching the same conclusion based upon the plain language of the statute. *Id.* at 564.

In this case, the respondent entered the United States as a refugee, not as a lawful permanent resident. He subsequently adjusted his status to that of a lawful permanent resident under the provisions of section 209 of the Act. *See Matter of D-K-*, 25 I&N Dec. 761, 763 (BIA 2012) (setting forth the procedure by which a person admitted as a refugee may adjust status under section 209 of the Act). Consistent with our holding in *Matter of J-H-J-*, the Immigration Judge properly concluded that the respondent did not enter the United States as a lawful permanent resident and was not precluded from applying for a section 212(h) waiver.

The DHS argues that this case is controlled by *Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012) (DHS Br. at 4-5). In that case, the United States Court of Appeals for the Eighth Circuit held that a refugee who adjusted status under section 209 of the Act and subsequently was convicted of an aggravated felony was not eligible for a section 212(h) waiver. The court concluded that the alien was lawfully admitted for permanent residence at the time of his admission under section 209(a)(1) of the Act. 688 F.3d at 539. The court reasoned that sections 209(a)(1) and 212(h) of the Act incorporated the same definition of admission, such that admission "under the former is equivalent to admission under the later." *Id.* (internal quotation marks omitted).

We agree with the Immigration Judge that *Matter of J-H-J-* (which arose in the Eighth Circuit) controls the outcome of this case. That case was decided several years after *Spacek v. Holder*. Moreover, *Matter of J-H-J-* acceded to "overwhelming circuit court authority" based on the plain language of section 212(h) of the Act. 26 I&N Dec. at 564. The Eighth Circuit at the time *J-H-J-* was decided was alone among the circuits in finding the language of section 212(h) of the Act to be ambiguous and thus deferred to our prior interpretation. *See Roberts v. Holder*, 745 F.3d 928 (8th Cir. 2014). *J-H-J-* thus reflects our conclusion that the Eighth Circuit would likewise defer to our current interpretation. Accordingly, he is not barred from seeking a waiver under section 212(h) of the Act.

Accordingly, the following orders will be entered.

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[1] The respondent had previously been ordered removed from the United States, but the Immigration Judge sua sponte reopened these removal proceedings.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the DHS the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD