**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*

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**Name: A[redacted], A[redacted] H[redacted]**

**A [redacted]-626**

**Date of this notice: 8/14/2019**

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:
Cole, Patricia A.

Pam Boyd
Userteam: Docket

File: A[redacted]-626 – Fort Snelling, MN Date: AUG 14 2019

In re: A[redacted] H[redacted] A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lisa Temich Kaiser, Esquire

ON BEHALF OF DHS: Luke R. Nelson
Assistant Chief Counsel

APPLICATION: Waiver of inadmissibility

In a decision dated March 25, 2019, an Immigration Judge granted the respondent's application for adjustment of status pursuant to section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, along with a corresponding waiver pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The Department of Homeland Security (DHS) has appealed from that decision. The respondent opposes the appeal, which will be dismissed.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On September 22, 2005, the respondent entered the United States as a refugee, and on June 7, 2008, adjusted to lawful permanent resident status under section 209 of the Act, 8 U.S.C. § 1159 (IJ at 1). On July 29, 2010, the respondent was convicted of aggravated tampering with a witness, and sentenced to 86 months in jail (IJ at 1). The parties do not dispute that the respondent is removable as charged and that he is ineligible for asylum and withholding of removal (IJ at 1-2). Further, the parties agree and concede that the respondent has met the requirements for adjustment of status under section 245 of the Act as well as the hardship and discretionary requirements for a waiver under section 212(h) of the Act (IJ at 2).

On appeal, the DHS argues that the respondent is ineligible for a waiver under section 212(h) of the Act, however, because he was convicted of an aggravated felony after he was admitted as a lawful permanent resident. The only issue on appeal, then, is whether the respondent is precluded from eligibility for a waiver under section 212(h) of the Act on that basis.

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 DHS argues, however, that *Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012), reached a contrary determination that is dispositive. In that case, the United States Court of Appeals for the Eighth Circuit, under whose jurisdiction this case arises, 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. The Eighth Circuit, however, was alone among the circuits in finding the language of section 212(h) ambiguous and deferring to our prior decisions in *Matter of E. W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012), and *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010) (holding 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). *See Roberts v. Holder*, 745 F.3d 928 (8th Cir. 2014). We withdrew from those cases in *Matter of J-H-J-*, and adopted the position of the nine circuits that concluded 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." *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, but that creation of a legal fiction regarding when the alien was admitted as a lawful permanent resident 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. Therefore, the respondent's entry into the United States as a refugee and subsequent adjustment of status under section 209 of the Act does not render him ineligible for a waiver of inadmissibility under section 212(h) of the Act.

The appeal will be dismissed, and the record will be remanded for the requisite background checks.

ORDER: The DHS's 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 Department of Homeland Security 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