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], B[redacted] V

A [redacted]618

Date of this notice: 7/5/2017

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

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

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

Userteam: Docket

File: A[redacted] 618 – Atlanta, GA

Date:

JUL - 5 2017

In re: B[redacted] V. N[redacted], a.k.a. B[redacted] V[redacted] N[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Tien G. Nguyen, Esquire

ON BEHALF OF DHS: James J. Crofts
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: Adjustment of Status

In a decision dated October 26, 2016, an Immigration Judge found the respondent, a native and citizen of Vietnam and lawful permanent resident of the United States, ineligible for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (2012), in conjunction with his application for adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a), and ordered him removed to Vietnam. The respondent has filed an appeal of that decision. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings.

We review findings of fact, including credibility findings, under the "clearly erroneous" standard. 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).

The respondent was admitted to the United States as a refugee on September 4, 1987. He adjusted status to that of a lawful permanent resident under section 209 of the Act, 8 U.S.C. § 1159, in May 1989. On August 27, 1996, the respondent was convicted in Georgia of aggravated assault, which he has conceded is an aggravated felony. In January 2012, the respondent arrived at the international airport in Atlanta, Georgia, from a trip abroad and presented himself as a returning lawful permanent resident. Shortly thereafter, the DHS placed the respondent in removal proceedings through the issuance of a Notice to Appear. The respondent appeared in immigration court, conceded removability, and submitted applications for relief, including a request for a waiver of inadmissibility under section 212(h).[1]

[1] The respondent also submitted but thereafter withdrew an application for a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c).

The Immigration Judge concluded that the respondent is ineligible for a 212(h) waiver, distinguishing his case from *Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363, 1367 (11th Cir. 2011), in which the United States Court of Appeals for the Eleventh Circuit held that the 212(h) waiver "does not apply to those persons who . . . adjusted to lawful permanent resident status while already living in the United States" (I.J. at 3–4).[2] The Immigration Judge reasoned that the adjustment of status language found in section 209 of the Act requires an "admission" at a point in time when an alien is considered to be a lawful permanent resident (I.J. at 3).[3] Thus, the Immigration Judge concluded that because the respondent adjusted his status under section 209, he was lawfully admitted for permanent residence at the time of his admission and his subsequent aggravated felony conviction renders him ineligible for a 212(h) waiver (I.J. at 3).[4]

The primary issue this case presents is whether a refugee who adjusts status to that of a lawful permanent resident pursuant to section 209 of the Act is eligible for a section 212(h) waiver of inadmissibility. The relevant text of section 209(a)(1)(C) provides that any alien seeking adjustment of status, who has been admitted as a refugee to the United States and physically present for at least 1 year "shall, at the end of such year period, return or be returned to the custody of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant." Section 209(a)(2) provides in pertinent part that "[a]ny alien who is found upon inspection and examination by an immigration officer . . . to be admissible . . . 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."[5]

The Immigration Judge correctly determined that the respondent was "admitted" to the United States when he adjusted his status to lawful permanent resident under section 209 of the Act. Indeed, the Board has recognized that, based on the language of section 209(a)(1)(C), a refugee who adjusts status to that of a lawful permanent resident "will have been 'admitted' twice--first,

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[2] The relevant text of section 212(h) of the Act provides that no waiver shall be granted to "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."

[3] The terms "admitted" and "admission" are defined as "with respect to an alien, 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). The phrase, "lawfully admitted for permanent residence" is defined as "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, such status not having changed." Section 101(a)(20) of the Act; 8 U.S.C. § 1101(a)(20).

[4] The Immigration Judge found persuasive *Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012), a decision from the Eighth Circuit, in whose jurisdiction this case does not arise. In that case, the court held that the alien, who adjusted his status after his arrival pursuant to section 209 of the Act, was ineligible for a section 212(h) waiver because he was "lawfully admitted for permanent residence" at the time of his "admission." *Id.* at 539.

[5] Provisions such as this are often referred to as "rollback" provisions.

upon conditional admission under section 207 of the Act, and second, upon reinspection and adjustment to permanent resident status under section 209(a) of the Act." *Matter of D-K-*, 25 I&N Dec. 761, 768 (BIA 2012). The Board has also recognized, however, that the requirement that an alien be reinspected for admission under section 209(a)(1)(C) "does not undermine his or her initial admission as a refugee under section 207 of the Act." *Id.* at 769.

Notwithstanding the fact that a once refugee, now lawful permanent resident has been "admitted" twice, the Board and a majority of the circuit courts focus on an alien's status at the time of his or her initial admission into the United States when determining eligibility for a section 212(h) waiver. Indeed, the Board and nine circuits—the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh—have held that an alien who obtained lawful permanent resident status after having been present in the United States prior to obtaining that status is not barred from establishing eligibility for a section 212(h) waiver; this is so because "the plain language of section 212(h) of the Act precludes aliens from establishing eligibility for relief *only* if they lawfully entered the United States as permanent residents and thereafter committed an aggravated felony." *Matter of J-H-J-*, 26 I&N Dec. 563, 564 (BIA 2015) (emphasis in original); *Medina-Rosales v. Holder*, 778 F.3d 1140, 1144 (10th Cir. 2015); *Husic v. Holder*, 776 F.3d 59, 60–67 (2nd Cir. 2015); *Stanovsek v. Holder*, 768 F.3d 515, 516, 517–19 (6th Cir. 2014); *Negrete–Ramirez v. Holder*, 741 F.3d 1047, 1050–54 (9th Cir. 2014); *Papazoglou v. Holder*, 725 F.3d 790, 792–94 (7th Cir. 2013); *Leiba v. Holder*, 699 F.3d 346, 348–56 (4th Cir. 2012); *Hanif v. Att'y Gen.*, 694 F.3d 479, 483–87 (3rd Cir. 2012); *Bracamontes v. Holder*, 675 F.3d 380, 382, 384–89 (4th Cir. 2012); *Lanier v. U.S. Att'y Gen.*, *supra*, at 1365–67; *Martinez v. Mukasey*, 519 F.3d 532, 541–46 (5th Cir. 2008). Put another way, "a person must have physically entered the United States, after inspection, as a lawful permanent resident" in order to have previously been admitted to the United States as an alien lawfully admitted for permanent residence. *Lanier*, 631 F.3d at 1366–67.

With these standards in mind, we consider the fact that the respondent physically and lawfully entered the United States in 1987 as a refugee; he was admitted in that status following inspection. Although he had to report for inspection and a subsequent admission pursuant to section 209(a)(1)(C) of the Act for his post-entry adjustment of status in May 1989, the respondent did not physically exit the country as a refugee and then reenter as a lawful permanent resident after adjusting his status. On these facts, the respondent's case is not meaningfully distinguishable from *Lanier v. U.S. Att'y Gen.* and because "the statutory bar to relief does not apply to those persons who, like [the respondent], adjusted to lawful permanent resident status while already living in the United States[,]" we conclude that the respondent is not barred from establishing eligibility for a 212(h) waiver. *Id.* at 1367; *see also Matter of J-H-J-*, 26 I&N Dec. at 563. The "admission" language found in section 209(a)(1)(C), read together with the rollback language of section 209(a)(2), does not alter this conclusion. Based on the foregoing, the respondent's appeal is sustained and the record will be remanded to the Immigration Judge for further proceedings. Accordingly, the following order is entered.

ORDER: The appeal is sustained and the record is remanded to the Immigration Judge for further proceedings consistent with this order.

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**
	)	
N[redacted], B[redacted] V[redacted]	)	**File No. A# [redacted]618**
	)	
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)(F) of the Act, to wit; a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment is at least one year.

APPLICATION: Department's Motion to Pretermit Respondent's Application for a Waiver of Inadmissibility under section 212(h) of the Act.

APPEARANCES

ON BEHALF OF THE RESPONDENT:

Tien G. Nguyen, Esq.
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ON BEHALF OF THE GOVERNMENT:

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

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

B[redacted] V[redacted] N[redacted] ("Respondent") is a male native and citizen of Vietnam. On September 8, 1984, he was accorded Lawful Permanent Resident status of the United States.

On or about August 27, 1996, Respondent was convicted in the Superior Court of Hall County, Georgia for the offense of Aggravated Assault. For this offense, he was sentenced to two (2) years confinement and/or eight (8) years probation.

On or about January 31, 2012, Respondent arrived at the Atlanta Hartsfield-Jackson International Airport, Atlanta, Georgia as a returning lawful permanent resident.

On February 22, 2012, the Department of Homeland Security ("Department") placed Respondent into removal proceedings through the issuance of a Notice to Appear ("NTA"). See Exh. 1. The NTA stated that the Respondent was subject to removal pursuant to section

212(a)(2)(A)(i)(I) of the Immigration and Nationality Act ("INA" or "Act"), in that Respondent was an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

On December 20, 2012, the Department submitted and I-261, Additional Charges of Inadmissibility/Deportability, substituting allegation #5 the charge of removability for 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)(F) of the Act, to wit; a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment is at least one year. See Exh. 1B. On the same date, Respondent submitted written pleadings admitting the allegations and conceding the charge of removability. Respondent also submitted his applications for relief under sections 212(c) and 212(h) of the Act.

On January 5, 2016, the Department filed a Motion to Pretermit Respondent's application for a waiver under section 212(h) of the Act stating Respondent is statutorily ineligible for the waiver.

On January 6, 2016, the Court requested Respondent file a brief in response to the Department's Motion to Pretermit. At the conclusion of the hearing, the Court reserved its decision.

On February 8, 2016, Respondent filed a Notice of Withdrawal of his application for relief under section 212(c) of the Act.

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 grant the Department's motion to pretermit Respondent's application for a section 212(h) waiver. As Respondent has not identified any other form of relief which he is seeking, the Court will order Respondent removed to Vietnam based on the charge of removability.

II. EVIDENTIARY RECORD

A. Documentary Evidence

Exhibit 1: Respondent's NTA, dated February 22, 2012;

Exhibit 1B: I-216, Additional Charges of Inadmissibility/Deportability, dated December 20, 2012;

Exhibit 2: Respondent's Conviction Documents from Hall County;

Exhibit 3: I-213, Record of Deportable/Inadmissible Alien;

Exhibit 4: Record of Sworn Statement in Administrative Proceedings, dated January 31, 2012;

Exhibit 5: Written Pleadings;

Exhibit 6: I-191, Application for Advance Permission to Return to Unrelinquished Domicile;

Exhibit 7: I-601, Application for Waiver of Grounds of Inadmissibility.

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, grant a 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." Id. (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." Id. at § 101(a)(20).

Respondent contends that because he adjusted his status post-entry into the United States under the Refugee Act, section 209 of the Act, he has not been previously admitted to the United States as a lawfully admitted permanent resident. Therefore, he is still eligible for a section 212(h) waiver. The Department alleges that because Respondent adjusted status under section 209 of the Act, he is regarded as being "lawfully admitted to the United Sates for permanent residence as of the date of such alien's arrival into the United States." See INA § 209(a)(2).

Under Lanier v. U.S. Atty. Gen., an alien who adjusted his status post-entry is not barred from seeking a 212(h) waiver. 631 F.3d 1363 (11th Cir. 2011). In Matter of J-H-J-, the Board of Immigration Appeals ("Board") held that a section 212(h) waiver is only precluded to aliens who were previously "admitted" (or made an entry) to the United States as lawful permanent residents. 26 I&N Dec. 563, 565 (BIA 2015). However, Respondent's case is distinguishable as he adjusted his status after his arrival pursuant to section 209 of the Act.

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" (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. Therefore, an adjustment under section 209(a) requires, by its own language, an "admission." Because Respondent was "lawfully admitted for permanent residence" at the time of his "admission" under section 209(a)(1), his subsequent aggravated felony disqualifies him from seeking a section 212(h) waiver of inadmissibility. See Spacek v. Holder, 688 F.3d 536, 539 (8th Cir. 2012) (cited for persuasiveness) (an alien who adjusts under section 209 of the Act is barred from seeking a waiver under 212(h) because, no matter how section 212(h) is interpreted throughout the different circuits, an applicant for adjustment under section 209 of the Act is "admitted" as a lawful permanent resident under section 209(a)(1(C)).

Furthermore, the adjustment of status by a refugee operates retroactively under section 209(a)(2) of the Act to enable a noncitizen to seek United States citizenship at least a full year earlier than would otherwise be possible. See Gutnick v. Gonzales, 469 F.3d 683, 684 (7th Cir. 2006) (cited for persuasiveness) (Because the adjustment of status by a refugee operates retroactively, the respondent was regarded as admitted for permanent residence as of the date he arrived in the United States) *overruled on other grounds*, Arobelidze v. Holder, 653 F.3d 513 (7th Cir. 2011). Unlike section 235(b) of the Act as Respondent alleges, section 209 is not retroactive to work as an "accounting mechanism for the purpose of the limitation of the number of refugees that may enter per year." See Respondent's Response to the Motion to Pretermit at n.2.

IV. CONCLUSION

The Court grants the Department's motion to pretermit 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 he 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 Vietnam.

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 **VIETNAM**.

10-26-2016
Date

J. Dan Pelletier
United States Immigration Judge
Atlanta, Georgia