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

V[redacted]-R[redacted], T[redacted]
[redacted]/[redacted]286
PIKE COUNTY
175 PIKE COUNTY BLVD
LORDS VALLEY, PA 18428

DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: V[redacted]-R[redacted], T[redacted]

A[redacted]286

Date of this notice: 5/26/2017

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

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Cole, Patricia A.
Wendtland, Linda S.

Userteam: Docket

File: [redacted] 286 – York, PA Date: MAY 26 2017

In re: T[redacted] V[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Jeffrey T. Bubier
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony (as defined in section 101(a)(43)(M))

APPLICATION: Adjustment of status; section 212(h) waiver

The respondent, a native and citizen of Sri Lanka, is a lawful permanent resident ("LPR") of the United States. The respondent appeals a decision, dated December 9, 2016, in which an Immigration Judge pretermitted his application for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), based on his conviction for an aggravated felony. The appeal will be sustained and the record will be remanded.

The Board reviews an Immigration Judge's findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review issues of law, discretion, or judgment de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On December 1, 2014, the respondent was convicted of Wire Fraud in violation of 18 U.S.C. § 1343, and sentenced to 24 months of imprisonment (I.J. at 2; Exh. 2, Tab D). The respondent has conceded that his conviction renders him removable as charged (I.J. at 2, 7; Tr. at 3). Moreover, it is not in dispute that the respondent's conviction makes him inadmissible under section 212(a)(2)(a)(i)(I) of the Act, such that he requires a section 212(h) waiver to adjust status (I.J. at 2). *See* section 245(a) of the Act, 8 U.S.C. § 1255(a).

The Immigration Judge properly determined that the respondent initially was admitted to this country on an H-1B nonimmigrant visa in July of 1998, and he subsequently became an LPR through adjustment of status within the United States in October of 2004 (I.J. at 4, 8; Tr. at 39-40;

[1] On March 13, 2017, the Board received correspondence from the respondent indicating that he wished to dismiss his former attorney Egi Deromemaj, Esquire. The Board issued a notice on March 30, 2017, acknowledging the dismissal of the respondent's attorney.

Exh. 2, Tabs B-C). The record further supports the Immigration Judge's finding that between 2009 and 2013, the respondent engaged in the conduct that eventually led to his conviction for Wire Fraud (I.J. at 4; Tr. at 41-43; Exh. 2, Tab D at 7, 14, and 16). Additionally, we will affirm the Immigration Judge's ruling that the respondent left the United States in 2012, and traveled to India and England before being allowed to re-enter this country (I.J. at 5, 8; Tr. at 46-47).

The Act provides in relevant part that no section 212(h) 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 the alien has been convicted of an aggravated felony since the date of admission. Section 212(h)(2) of the Act. An alien who enters the United States and subsequently becomes an LPR via adjustment of status has not been "admitted to the United States as an alien lawfully admitted for permanent residence" within the meaning of section 212(h)(2) because of the adjustment. *Hanif v. Att'y Gen. of U.S.*, 694 F.3d 479, 484-87 (3d Cir. 2012); *see also Matter of J-H-J-*, 26 I&N Dec. 563, 564-65 (BIA 2015). Although the respondent entered the United States and subsequently became an LPR through adjustment of status, the Immigration Judge determined that he cannot benefit from the rule announced in *Hanif v. Att'y Gen. of U.S.*, *supra* (I.J. at 8-9). In this regard, the Immigration Judge found that at the time of his 2012 re-entry, the respondent came within the plain language of section 101(a)(13)(C)(v) of the Act as one who had "*committed* an offense identified in section 212(a)(2)," despite the fact that he was not *convicted* as a result of that conduct until December of 2014 (I.J. at 8-9) (emphasis added).[2] Thus, the Immigration Judge concluded that, notwithstanding his LPR status, the respondent must be regarded as having sought – and been granted – an admission to the United States after his attainment of that status, for purposes of his section 212(h) application (I.J. at 9).

On appeal, the respondent observes that the United States Supreme Court has stated that "[a]fter the words 'committed an offense,' [section 101(a)(13)(C)(v)'s] next words are 'identified in section [212(a)(2)].'" *Vartelas v. Holder*, 132 S. Ct. 1479, 1492 n.11 (2012). In turn, section 212(a)(2) "refers to 'any alien *convicted of*, or who admits having committed,' *inter alia*, 'a crime involving moral turpitude.'" *Vartelas v. Holder*, *supra*, at 1492 n.11 (citing section 212(a)(2)(A)(i)(I) of the Act) (emphasis in the original). The Court stated that "the entire [section 101(a)(13)(C)(v)] phrase 'committed an offense identified in section [212(a)(2)],' on straightforward reading, appears to advert to a lawful permanent resident who has been *convicted*

[2] While the Immigration Judge focused on the immigration consequences of the respondent's 2012 "readmission" (a term we here use only in the sense of the respondent's having been allowed to re-enter as an LPR), the respondent also testified that he was "readmitted" to the United States after visiting his mother in Australia sometime before his 6-month-old daughter passed away in September of 2011 (I.J. at 5; Tr. at 40-41, 47-48; Exh. 4, Tab 5). Similarly, the respondent testified that he had traveled to Canada a few times before he was convicted, but he was unsure of the dates on which he was "readmitted" (I.J. at 5; Tr. at 47-48). The respondent also asserts on appeal that he was last "readmitted" to the United States from the United Kingdom in April of 2014. The Immigration Judge's analysis would apply to each of these "readmissions" as well, because they all occurred after the respondent began committing Wire Fraud and before his December 2014 conviction.

of an offense under [section 212(a)(2)] (or admits to one)." *Vartelas v. Holder*, *supra*, at 1492 n.11 (emphasis added). At the time of the respondent's 2012 re-entry into this country, he had not yet been convicted of Wire Fraud. Therefore, we agree with the respondent that pursuant to *Vartelas v. Holder*, *supra*, the Immigration Judge erroneously held that he fell within section 101(a)(13)(C)(v) of the Act.

Further, if an inspecting officer determines that an LPR should be allowed to enter this country when he or she is at the point of entry and criminal charges have not yet resulted in a conviction (or the LPR has not admitted the elements), then that determination at the point of entry was correct and the LPR cannot be viewed as having "sought" an admission *at that time,* for immigration purposes. *See* sections 101(a)(13)(C)(v) and 212(a)(2)(A)(i)(I) of the Act. A way for the DHS to avoid this consequence is to parole the LPR pending prosecution so that the LPR can be viewed as "seeking" admission (not yet having been actually admitted) if and when a conviction is eventually obtained. *See Matter of Valenzuela-Felix*, 26 I&N Dec. 53 (BIA 2012). However, this did not happen in the present case. Thus, for the respondent to come within section 101(a)(13)(C)(v) of the Act, it would be necessary to find that he was "retroactively" seeking admission when the inspecting officer determined to allow him to re-enter, given subsequent developments. We decline to do so here. Under our clear and binding precedent, the question whether an LPR is seeking admission and is admissible is determined under the facts that exist at the time that the final determination whether to allow him to enter the country is made, not post hoc in light of developments (in this case, the Wire Fraud conviction) that did not occur until *after* that determination. *See Matter of Valenzuela-Felix, supra,* at 59-60 ("admissibility is determined on the basis of the law and facts existing at the time the application is finally considered.") (citing cases).[3]

For these reasons, based on the Supreme Court's and our own interpretation of the applicable law, we reverse the holding that the respondent's aggravated felony conviction renders him ineligible for a section 212(h) waiver. *See Hanif v. Att'y Gen. of U.S.*, *supra*, at 484-87; *Matter of J-H-J-*, *supra*, at 564-65.

The Immigration Judge further ruled that the respondent demonstrated the required extreme hardship to receive a waiver (I.J. at 9-10). *See Matter of Cervantes*, 22 I&N Dec. 560, 565-66 (BIA 1999). In addition, the Immigration Judge determined that the respondent had shown that his equities outweigh his negative factors, such that he merits a positive exercise of discretion (I.J. at 10-11). *See Matter of Mendez*, 21 I&N Dec. 296, 299-302 (BIA 1996). The DHS has not identified error in these alternate rulings, which we therefore will not disturb. It is also not in dispute that the respondent satisfies the remaining requirements of section 245(a) of the Act. As a result, we hold that the respondent is eligible for and deserving of a section 212(h) waiver and adjustment of status pending completion of the required background checks.

Accordingly, the following orders are entered.

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[3] Notably, the "stop-time" precedent upon which our dissenting colleague relies did not implicate our longstanding criteria pertaining to the timing of the determination of admissibility of an LPR seeking to return to the United States.

ORDER: The appeal is sustained, and the respondent is found eligible for and deserving of a section 212(h) waiver and adjustment of status.

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

File: [redacted] 286 – York, PA Date: MAY 26 2017

In re: T[redacted] V[redacted] [redacted] a.k.a. [redacted]

DISSENTING OPINION: Roger A. Pauley

This case turns on a legal issue that is subject to frequent recurrence given that there is often a considerable period between the commission of an offense and a resultant conviction. The resolution of the legal issue presents a choice between adopting dicta in a Supreme Court decision and adhering to the plain language of the statute (as we have done in a related context where the same language appears). The majority choose to follow the dicta; I opt, as did the Immigration Judge, to follow the clear terms of the statute and therefore respectfully dissent.

As explained in the majority decision, the issue here revolves around the language in section 101(a)(13)(C)(v) of the Act, which sets forth one of the circumstances in which a returning lawful permanent resident (LPR) will be deemed to be an applicant for admission and thus chargeable under section 212 of the Act. At the time the LPR respondent sought readmission in 2012, it is undisputed that he had committed, but had not yet been convicted of, wire fraud in violation of 18 U.S.C. § 1343, a felony that is concededly a crime involving moral turpitude and an aggravated felony. His conviction occurred in late 2014.

Section 101(a)(13)(C)(v) provides that a returning LPR shall not be regarded as seeking an admission "for purposes of the immigration laws" unless the alien "has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A."

Notably, the stop-time statute, section 240A(d)(1), uses the same "committed an offense" terminology as section 101(a)(13)(C), and provides that, for purposes of relief under section 240A – one of the statutes mentioned in section 101(a)(13(C)(v) – an alien's period of continuous residence or continuous physical presence will be deemed to end when "the alien has committed an offense referred to in section 212(a)(2)" that renders the alien inadmissible or removable. Both the federal courts, including the United States Court of Appeals for the Third Circuit in which this case arises, and the Board have consistently held that what triggers the stop-time rule is the "**commission**" of an offense, not the date of any later conviction. *See, e.g., Rachak v. Att'y Gen. of U.S.*, 734 F.3d 214 (3d Cir. 2013) (time held stopped when alien committed disqualifying offense in 2006 rather than on date of conviction in 2011, citing *Baraket v. Holder*, 632 F.3d 56 (2d Cir. 2011)); *Matter of Perez*, 22 I&N Dec. 689, 692-695 (BIA 1999) (so holding under a subtitle heading as follows: "UNDER THE NATURAL AND STRAIGHTFORWARD READING OF SECTION 240A(d)(1), TIME CEASES TO ACCRUE ON THE DATE AN OFFENSE IS COMMITTED"); *Matter of Robles*, 24 I&N Dec. 22, 27-28 (BIA 2006); *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006).[1]

[1] In *Matter of Perez, supra*, we examined at length the Act's differentiation in several provisions between language referring to a conviction and language referencing the commission of an offense, as setting forth the relevant date. *See, e.g.*, section 237(a)(2)(A)(i), referring to an alien who "is

In *Vartelas v. Holder*, 566 U.S. 257 (2012), the Supreme Court held that section 101(a)(13)(C) could not be applied retrospectively to a returning LPR who had committed and been convicted of a CIMT in 1994, prior to the enactment of that provision. In the course of its decision, the Court stated in a footnote that: "The entire § 1101(a)(13)(C)(v) phrase '**committed** an **offense identified** in section 1182(a)(2),' on straightforward reading, appears to advert to a lawful permanent resident who has been convicted of an **offense** under § 1182(a)(2) (or admits to one)." (emphasis in original) *Id.* at 275 n.11.[2]

The majority rely on this dicta to conclude that the respondent was not subject to the provisions of section 101(a)(13)(C)(v) when he arrived in 2012; that is, he had not been re-admitted at that time, because he had not yet been convicted. Consequently, the majority hold that the respondent's 2014 conviction, while an aggravated felony as well as a CIMT, did not bar him, as the Immigration Judge had held, from eligibility for a section 212(h) waiver as an alien "who has previously been admitted to the United States as an alien lawfully admitted for permanent residence."

I disagree and would construe section 101(a)(13)(C)(v) as applicable due to the fact that, at the time of his 2012 return, the respondent had "committed an offense" described in section 212(a)(2). While not an inflexible rule, the "normal" principle is that the same words appearing in different places in the same Act should be given the same construction. *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2004-05 (2012). And, as demonstrated above, the same language used in the stop-time provision has been interpreted universally to refer to the commission of an offense rather than the date of conviction. I perceive no reason to adopt a different construction for section 101(a)(13)(C)(v) than we and the courts of appeals have followed in section 240A(d)(1). Moreover, the Court's dicta in *Vartelas, supra,* was not accompanied by any analysis and was also not stated in a particularly authoritative manner, instead using the language "appears to advert."[3]

Accordingly, I would hold, as the Immigration Judge did below, that the respondent is not eligible for a section 212(h) waiver as he was admitted as a LPR in 2012 and has been convicted of an aggravated felony.

BOARD MEMBER

convicted of a crime involving moral turpitude committed within five years . . . after the date of admission."

[2] It is noteworthy that both the Supreme Court's dicta and our *Matter of Perez* decision use the same phrase "straightforward reading" to describe conflicting interpretations.

[3] Furthermore, the Court's use of the term "convicted" may have been influenced by the facts in *Vartelas*, where the retroactivity issue would not have been different whether the date of the commission of the respondent's offense or the date of conviction was employed inasmuch as both dates were in 1994 or prior. *See Crowe v. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004) (holding that Supreme Court dicta are entitled to "great weight" but only if "carefully considered").

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

Pastor & Deromemaj, P.C .
Deromemaj, Egi
1501 Broadway
12th Floor Room 12107
New York, NY 10036

IN THE MATTER OF FILE A [redacted]286 DATE: Dec 9, 2016
V[redacted]- [redacted], T[redacted]
50163-039[redacted]

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

_X_ OTHER: ___Attached please find a Written Decision and Order of the Immigration Judge_____

_____

_____BLS_____
COURT CLERK
IMMIGRATION COURT FF

CC: DISTRICT COUNSEL, C/O YORK PRISON
3400 CONCORD ROAD
YORK, PA, 17402

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
YORK, PENNSYLVANIA

In the Matter of	)	**In Removal Proceedings**
T[redacted] V[redacted] R[redacted]	)	**A[redacted]286**
Respondent	)	

CHARGE: INA §§ 237(a)(2)(A)(iii), to wit 101(a)(43)(M)

APPLICATION: Adjustment of status in conjunction with a § 212(h) Waiver of Inadmissibility

ON BEHALF OF THE RESPONDENT
Caridad Pastor Cardinale, Esq.
Pastor & Deromemaj, P.C.
525 E. Big Beaver Road, Suite 206
Troy, MI 48083

ON BEHALF OF DHS
Jeffrey Bubier, Esq.
Office of the Chief Counsel
Immigration and Customs Enforcement
York, PA 17402

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. FACTS AND PROCEDURAL HISTORY

Respondent is a native and citizen of Sri Lanka. Ex. 1. He was admitted into the United States on or about November 30, 1999 as a H-1B non-immigrant.[1] *Id.* He adjusted his status to that of a lawful permanent resident on or about October 29, 2004. *Id.* Respondent's wife became a United States citizen on December 3, 2009. Ex. 3-37.

In July 2012, Respondent left the United States and traveled to India and England. Ex. 4-6; *Respondent's oral testimony, October 31, 2016.*

[1] While Respondent conceded to being admitted to the United States on November 30, 1999, as indicated on the NTA, Respondent stated in his oral testimony that he was admitted to the United States in July 1998. On Respondent's I-601 he indicated that he entered the United States in 1991. The Court does not have any evidence in the record to verify which date is accurate; however, this decision is not impacted by the date of any of these alleged entries.

On December 1, 2014, Respondent was convicted in the United States District Court Eastern District of Michigan of Wire Fraud, in violation of 18 U.S.C. § 1343, and was sentenced to twenty-four month's imprisonment. Ex. 2-D. The loss to the victims exceeded $10,000. *Id.*

On August 31, 2015, the Department of Homeland Security (DHS) commenced removal proceedings by filing a Notice to Appear (NTA). Ex. 1. The NTA charged Respondent as removable pursuant to INA § 237(a)(2)(A)(iii) as an alien convicted of an aggravated felony as defined in INA § 101(a)(43)(M), a law relating to an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in the Internal Revenue Code of 1986, Section 7201 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000. *Id.*

Respondent conceded removability and removability is not in dispute. The charge of removal was sustained on October 27, 2015.[2] As relief from removal, Respondent seeks re-adjustment through his United States citizen spouse with a § 212(h) waiver. Respondent claims extreme hardship through his spouse and children.

On October 31, 2016, a merit hearing was held where Respondent and his wife presented their closing arguments before the Immigration Court. The matter was reset for December 1, 2016 for Respondent to submit additional evidence pertaining to his re-adjustment of status application. This Court appreciates the arguments and has fully considered all evidence whether referenced herein or not.

II. EVIDENCE

A. Documentary Evidence

Exhibit 1: Notice to Appear

Exhibit 2: DHS Evidence Submission
- Tab A: DHS Notice of Readiness and Objection to Continuances
- Tab B: First Page of Form I-485, Application to Register Permanent Resident or Adjust Status
- Tab C: Respondent's Non Immigrant Visa
- Tab D: Respondent's Conviction Record, Wire Fraud
- Tab E: Record of Deportable Alien, Form I-213
- Tab F: Voluntary Departure Notice

Exhibit 3: Respondent's Evidence Submission
- Tab 1: Respondent's Birth Certificate
- Tab 2: Marriage Records
- Tab 3: Respondent's Child Birth Certificate, A [redacted] V [redacted]
- Tab 4: Respondent's Child Birth Certificate, [redacted] V [redacted]

[2] Pursuant to Matter of Garza-Olivares, Respondent's Wire Fraud convictions are properly sustained as an aggravated felony because a sentence of two years' imprisonment or more *may* be imposed. 26 I&N Dec. 736 (BIA 2016).

Tab 5:	Notice to Appear
Tab 6:	Plea Agreement
Tab 7:	Immigrant Petition; Respondent's I-130 receipt
Tab 8:	Letter from Respondent's Wife, B [redacted] i K [redacted]
Tab 9:	Letter from Respondent's Brother; Brother's Passport
Tab 10:	Photograph of Gravestone of Respondent's Daughter
Tab 11:	Letter from Respondent's Daughter, A [redacted] i [redacted]
Tab 12:	Letter from Respondent's Daughter, [redacted] V [redacted] n
Tab 13:	Letter from Respondent's Friend, N [redacted] J [redacted]
Tab 14:	Respondent's 2014 Tax Return
Tab 15:	Department of Human Services Food Assistance Receipt
Tab 16:	Utility Bill, Gas
Tab 17:	Utility Bill, Electric
Tab 18:	Comcast Cable Bill
Tab 19:	Insurance Bill, Car/Home
Tab 20:	Rent Payment Receipt
Tab 21:	Sri Lanka Labor Force Survey 2014
Tab 22:	Sri Lanka National Human Development Report 2014, "Youth and Development"
Tab 23:	Medication Prescription Copy
Tab 24:	Health Care Receipt
Tab 25:	News Article, *Basic Needs Basic Rights*, "Sri Lanka"
Tab 26:	News Article, *The Sunday Times*, "Poor Mental Health: National Institute Can't Cope with the Demand" October 2013
Tab 27:	School Attendance Records
Tab 28:	Teacher Email Regarding Respondent's Daughter, A [redacted] V [redacted]
Tab 29:	Teacher Email Regarding Respondent's Daughter, A [redacted] V [redacted]
Tab 30:	Letter from Respondent's Daughter's School; A [redacted] V [redacted] 's 2013-2016 GPA
Tab 31:	World Bank Report, Sri Lanka's Education
Tab 32:	Sri Lanka National Human Development Report 2014, "Youth and Education"
Tab 33:	U.S. Department of State, Sri Lanka 2014 Human Rights Report
Tab 34:	News Article, *Aljazeera*, "To Raise Our Voice Against the Brutal Harassment of Our Neighboring Sister," August 2014
Tab 35:	News Article, *BBC*, "Outrage in Sri Lanka Over Teenager's Rape and Murder," May 2015
Tab 36:	Family Photographs
Tab 37:	B [redacted] i K [redacted] 's United States Certificate of Naturalization

Exhibit 4: Respondent's Evidence Submission

Tab 1:	2015 Tax Returns
Tab 2:	Copy of College Degree for B [redacted] K [redacted]
Tab 3:	Copy of Recent Bills with Itemized List

Tab 4: Affidavit of Ray Kamoo, Psychological Evaluation for B[redacted] K[redacted]
Tab 5: Birth and Death Certification, A[redacted] V[redacted]
Tab 6: Copy of Fee Submission/Biometrics and Proof of Mailing, Notice of Entry of Appearance *Form G-28*, Application to Register Permanent Residence or Adjust Status *Form I-485*, Application for Waiver of Grounds of Admissibility *Form I-601*
Tab 7: EOIR 28

Exhibit 5: DHS Motion to Pretermit Application for Respondent's Re-adjustment of Status Application

Exhibit 6: Letter from G[redacted] E[redacted] M[redacted]

Exhibit 7: Respondent's Response to DHS's Motion to Pretermit Re-adjustment of Status Application and Application for 212(h) Waiver

Exhibit 8: Report of Medical Examination and Vaccination Record, *Form I-693*

Exhibit 9: Motion for Respondent's Attorney to Appear Telephonically

B. Testimonial Evidence

a. Respondent

Respondent testified as follows:

Respondent was born on August 4, 1964 in Jaffna, Sri Lanka. On January 8, 1988, he left Sri Lanka and went first to India and then to England. In July 1998, Respondent left England and came to the United States on a H-1B nonimmigrant visa. In October 2004, Respondent adjusted his status to a lawful permanent resident. Respondent is married to a United States citizen and has two living citizen daughters.[3]

Respondent testified that he committed wire fraud from 2009-2113. In 2009, Respondent's business, "IT Works," was struggling financially, and he began submitting false invoices to Sterling National Bank (Sterling), a payroll company funding bank. As the Court understands, IT Works provided temporary technical employees to other companies. These "client companies" would then pay IT Works directly after the work was completed. Since IT Works needed to pay its employees as they performed the work, Sterling provided payroll loans to IT Works. IT Works would submit copies of its invoices to Sterling, which advanced the money to IT Works in order to pay its employees. IT Works then repaid the payroll loans to Sterling with interest.

[3] Respondent testified that his youngest daughter was born on February 8, 2011 and passed on September 4, 2011 due to breathing difficulties.

Respondent testified that one of his client companies did not pay its invoice on time. Five of Respondent's employees worked for that company; all five had H-IB visas. When IT Works did not repay Sterling for the payroll loan for these five employees, Sterling terminated the payroll funding for the five employees. Respondent testified that he could not keep the employees without paying them, and he needed notice to release them. Respondent began submitting false invoices from fictitious client companies in order to derive more payroll loans. Respondent used the loans, in part, to pay off the loans and interest to Sterling and for other business expenses.[4] Respondent stated that he should have closed his company and released his employees. He was concerned, however, for the welfare of his H-1B employees, individuals similar to himself, and what might happen to them if his company closed. He stated that he did not realize the significance of his crime at the time.

On September 4, 2011, Respondent's youngest daughter passed away while Respondent's wife and children were in Canada. Respondent's wife suffered tremendously after their daughter's death. Respondent tried to help his wife and children recover from the loss of his third daughter by practicing meditation with his children, trying to help his wife focus on positive things, and managing most of the household duties. In 2012, Respondent and his family went to India for religious or spiritual purposes associated with his daughter's death.[5] When asked if he traveled abroad any other times, Respondent testified that he went to Australia to visit his mother some time before his daughter passed away but was unsure of the date. Respondent also travelled to Canada a few times but was uncertain of exact dates. None of these trips lasted more than three weeks, and he never had any difficultly reentering the United States.

In 2013, Respondent called Sterling and said that he had been committing wire fraud. Sterling turned the case over to the FBI and shortly thereafter criminal proceedings were initiated. In 2014, Respondent closed his company and was subsequently hired by Collasys LLC to do information technology. In December 2014, Respondent was convicted of wire fraud and given a twenty-four month sentence. He served twenty-one months.

Respondent's wife was already suffering emotionally due to the loss of their daughter when she found out he had committed wire fraud. The knowledge of Respondent's crime compounded her emotional challenges. Respondent's wife suffered from suicidal thoughts and she saw a psychologist. The family physician prescribed anti-anxiety medication.

Respondent's wife and children have been suffering extreme financial difficulties as they depend on him for support. Respondent's wife does not work outside the home, has never held full-time employment, and is currently unable to work due to her mental health needs. Her only job experience has been part-time work for Respondent's company which she did under his supervision. Respondent has had no income since January 2015, and his family has been living on loans provided by relatives and friends. Respondent owns two cars and a couple of computers but has no other notable assets.

[4] It was unclear from Respondent's testimony whether he acquired any personal enrichment by the loans or if they were solely used for business purposes. Respondent owes Sterling a total of $ 946,220 in restitution charges. Ex. 2-D.

[5] Respondent testified that he also traveled to England as part of his 2012 trip to India.

Respondent is very remorseful for committing wire fraud. He is especially sorry for the difficulty his crime caused his already struggling wife. Respondent stated, " I messed up her life . . . her emotional, physical everything because of what I did." Respondent stated that what he did "was like a torture for her." Respondent testified that there was no excuse for his fraud and that he should have closed his company. At one point, Respondent considered committing suicide in order to receive money from his life insurance policy but later learned that if his death was purposeful, his family would not receive the proceeds.

Respondent believes Sri Lanka is not a safe place for his children, and since his children do not speak Tamil they would not be able to receive a proper education. Respondent is close to his daughters and frequently helps them with their studies. Respondent's wife is unable to help their children with their studies on her own due to her emotional and mental health challenges. She also struggles to manage the children on a daily basis and does not have family or friends that could assist her.

Respondent no longer has any family in Sri Lanka and believes it would be very difficult for him to find a job to support his family. He believes it is impossible for his wife and children to go back to Sri Lanka. They no longer have any family in Sri Lanka, finding work would be very difficult, and his children could not communicate. If Respondent were to be removed, his family would stay in the United States but could not sustain themselves without his support.

Respondent testified that Collasys LLC would employ him if he stayed in the United States, and he could support his family.

Respondent deeply regrets his crime and the tremendous suffering that he caused his children and his wife. If Respondent were permitted to stay in the United States, he would not commit another crime and he would take care of his family.

a. B[redacted] V[redacted] K[redacted], Witness

B[redacted] V[redacted] K[redacted], a United States citizen, testified as follows:

B[redacted] is Respondent's wife. She currently resides in Bloomfield Hills, Michigan with her and Respondent's two teenage daughters. Respondent and B[redacted] had a third daughter who passed away in September 2011. B[redacted]i testified that while in Canada with her daughters, the youngest daughter had difficulty breathing. B[redacted] took her to the ICU after which her daughter passed away within two hours. After her daughter passed away, B[redacted]i suffered from depression, anxiety, and she cried frequently. She had great difficulty managing her life and children. Respondent handled many of the household duties, including grocery shopping and helping the girls with their homework.

When Respondent told B[redacted] he had committed wire fraud and would have to spend time in prison, her depression and anxiety increased. She cried frequently and suffered from insomnia and panic attacks. Respondent's crime and imprisonment took a tremendous toll on her and the children. They suffered financial hardships and had to borrow money from friends and relatives

in order to survive. Respondent's daughters also suffered emotionally and were often stressed and angry. Both daughters' grades dropped.

B[redacted] and her daughters saw a psychologist. Her family doctor prescribed blood pressure and anxiety medication for her. She could not continue to see the psychologist because it was not covered by her insurance. She currently takes the blood pressure medication on a regular basis and takes the anxiety medication as needed.

B[redacted]i testified that she has a good relationship with her husband and they have a very strong bond. She believes he is a good man, friend, and father who takes care of the family. She testified that Respondent would even help the children with their homework while he was detained by preparing questions and sending them in the mail. B[redacted] does not think her husband could get a job in Sri Lanka, and she and the children would be unable to go with him if he were removed. B[redacted]i left Sri Lanka in 1991 during the civil war, and she has no family or property there. If her husband were removed she would have no means of supporting herself and children. Due to her emotional and psychological condition she would be unable to obtain employment and she can no longer ask friends and relatives to support her and the children. She believes her children's lives would be destroyed if her husband were removed to Sri Lanka.

b. Further support

The Court notes that several letters of support were submitted on Respondent's behalf. Respondent's wife and children submitted letters as well as a family friend. The Court has fully considered these positive factors.

III. LEGAL ANALYSIS

a. Statutory Eligibility for § 212(h) waiver

INA § 212(h) provides:

> No waiver shall be provided in the case of an alien who has previously been admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation proceedings to remove the alien from the United States.

Respondent conceded that he has been convicted of an aggravated felony as defined in INA § 101(a)(43)(M). Thus, at issue here is only whether Respondent has been previously admitted for permanent residence.

Pursuant to Hanif v. Att'y Gen., the bar to § 212(h) waivers only applies to aliens who have been lawfully admitted to the United States for permanent residence. 694 F.3d 479 (3d Cir. 2012); *see also* Matter of J-H-J, 26 I&N Dec. 563 (BIA 2015).

Respondent adjusted his status to that of a lawful permanent resident (LPR) in the United States on October 29, 2004. Ex. 1, Ex. 2-B. Respondent testified that in 2012 he left the United States and traveled to India and England. An LPR entering the United States is not generally considered to be seeking admission unless he falls under one of the six exceptions set forth in INA § 101(a)(13)(C).[6] Therefore, since Respondent adjusted status to that of an LPR in 2004, after arrival, the bar under INA § 212(h) will not apply unless he falls under one of the exceptions.

a. Respondent committed an offense identified in § 212(a)(2) and was therefore seeking admission when entering the United States in 2012.

The DHS bears the burden of proving, by clear and convincing evidence, that Respondent is subject to one of the six exceptions. Matter of Rivens, 25 I&N Dec. 623, 3 (BIA 2011). The DHS submits that Respondent falls under the fifth exception identified in § 101(a)(13)(C) which includes aliens who have "committed an offense identified in § 212(a)(2), unless since such offense the alien has been granted relief under INA § 212(h) or § 240A(a)." The term "committed an offense" requires a conviction or admission of the act. Vartelas v. Holder, 132 S.Ct. 1479, 1492, n. 11 (2012).

INA § 212(a)(2) includes Crimes of Moral Turpitude (CIMT). *See* INA § 212(a)(2)(A)(i). Courts have long held that fraud offenses constitute crimes involving moral turpitude. Matter of Flores, 17 I&N Dec. 225 (BIA 1980); Jordan v. De George, 341 U.S. 223, 232 (1951). A crime may involve moral turpitude even without a specific intent to defraud. In re Kochlani, 24 I&N Dec. 128 (2007); Matter of Flores, 17 I&N Dec. at 228; Matter of Tejwani, 24 I&N Dec. 97, 98 (BIA 2007).

The DHS provided conviction documents reflecting that Respondent was convicted of Wire Fraud on December 1, 2014. Ex. 2-D. In his oral testimony, Respondent conceded that he committed wire fraud from 2009 through 2013.[7] To prove wire fraud under 18 U.S.C. § 1341, the prosecution must establish beyond a reasonable doubt that the defendant (1) knowingly and willfully participated in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) used wire communications in furtherance of the scheme. United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir.1984). Since § 1341 necessarily involves an element of fraud or deceit, it therefore constitutes a CIMT as defined in INA § 212(a)(2) .

Respondent left the United States in July 2012, and he returned less than three weeks later.[8] Respondent had not yet been convicted of wire fraud at the time of his 2012 return to the United States. However, the plain language of INA § 101(a)(13)(C)(v) uses "committed" rather than

[6] INA § 101(a)(13)(C) provides that "an alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking admission into the United States for purposes of immigration laws" except in six specific circumstances.

[7] The DHS also provided evidence via the criminal information which reflected that Respondent was committing wire fraud from 2009 to 2013. Respondent ultimately pled to these facts and was adjudicated guilty. Ex. 2-D, pp.1,14.

[8] Respondent's Form I-601 provides that Respondent left the United States in July 2012 and reentered August 2012. Ex. 4-6.

"convicted." His 2014 conviction provides this Court with clear and convincing evidence that Respondent had committed wire fraud, a CIMT, prior to 2012. Ex 2-D. Since Respondent committed a CIMT prior to his 2012 entry, he would be regarded as "seeking admission" pursuant to § 101(a)(13)(C)(v) upon his lawful 2012 admission. Respondent has not been granted relief under INA §§ 212(h) or 240A(a). Therefore, under Hanif v. Att'y Gen., Respondent falls within the fifth exception in § 101(a)(13)(C) and is ineligible for a 212(h) waiver. 694 F.3d 479 (3d Cir. 2012).

Accordingly, the Court will grant DHS's motion to pretermit Respondent's application for re-adjustment of status and finds that Respondent is statutorily ineligible for a waiver under INA § 212(h).

Although Respondent is statutorily ineligible for a waiver under INA § 212(h), in the interest of a thorough decision, this Court will consider the extreme hardship to Respondent's qualifying relatives, as well as whether Respondent merits a favorable exercise of discretion as if he were statutorily eligible for the waiver.

b. Extreme hardship

Pursuant to Matter of Cervantes-Gonzalez, when determining whether a United States citizen would face extreme hardship if the respondent were deported, the court may weigh, but is not limited to, factors such as the presence of lawful permanent resident or United States citizen family ties to this country; the qualifying relative's family ties outside the United States; the country conditions to which the qualifying relative would relocate; the financial impact of departure from the United States; significant health conditions, and unavailability of medical care in the country to which the qualifying relative would relocate. 22 I&N Dec. 560, 566 (BIA 1999).

Pursuant to 8 § C.F.R. 212.7(d), a heightened standard applies in exercising discretion for cases involving violent or dangerous crimes. DHS does not contend that a heightened standard applies in this case. After consideration of all the evidence, the Court concurs with DHS and is not applying the heightened standard.

Respondent has significant United States citizen family ties. His wife, B[redacted], and his two daughters are citizens. Ex.3, Tabs 3, 4, 37.

This Court finds that Respondent's United States citizen wife, B[redacted], would suffer extreme hardship if Respondent were removed to Sri Lanka. First, B[redacted] would suffer severe financial hardship. Respondent has been the principle provider throughout his marriage to B[redacted] and earned a steady salary until his wire fraud conviction in 2014. The Court found B[redacted]'s testimony to be extremely compelling.

While B[redacted] has a Bachelor's Degree in Mathematics, she has never held full-time employment. Her only employment consisted of working part-time for her husband and under his direction. Additionally, anxiety and depression are likely to prevent her from gainful

employment. B[redacted] testified that her source of income the past two years has been loans from friends and relatives who are no longer able to provide financial support.

B[redacted] would also suffer extreme emotional hardship if Respondent were removed. Respondent has consistently done much of the household duties, including helping the children with their studies. B[redacted] relies on him for emotional support for her current anxiety and continued grief over the loss of their daughter. B[redacted] testified that Respondent was a good husband and friend to her. B[redacted] has no other relatives in the area to assist her with the children or provide emotional support to her. B[redacted] no longer has any ties in Sri Lanka.

Respondent's daughters would also suffer extreme hardship if their father were removed. Neither daughter speaks Tamil and would not move to Sri Lanka if their father were removed. Respondent's daughters have no family ties besides their parents in the United States and their mother's emotional condition is such that raising them alone would be very difficult. Respondent provides much of the educational support and both daughters' grades have declined since Respondent's imprisonment. Because their mother could not work, she would be unable to provide for them financially on her own.

This Court finds Respondent statutorily ineligible for re-adjustment of status and the § 212(h) waiver. If Respondent were statutorily eligible for the requested relief, however, this Court would have granted the waiver as a matter, because Respondent has established extreme hardship to his USC spouse and children.

c. Re-adjustment of status application with discretionary grant of § 212(h) waiver

In Matter of Marin, the Board set forth factors to be considered by the Court in evaluating whether § 212(h) relief is warranted as a matter of discretion. 16 I&N Dec. 581 (BIA 1978). The Court first considers Respondent's favorable factors, which may include family ties in the United States; residence of long duration in this country; evidence of hardship to the alien and his family; service in this country's Armed Forces; history of stable employment; evidence of genuine rehabilitation; evidence of value and service to the community; existence of property or business ties; and other evidence attesting to the alien's good character. *Id.* The positive factors weigh against the adverse factors, which include the nature and underlying circumstances of the exclusion ground at issue; the presence of additional significant violations of this country's immigration laws; the existence of a criminal record and, if so, its nature, recency, and seriousness; and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. *Id.*

As discussed above, Respondent has significant family ties and his United States citizen wife and children would suffer extreme hardship if he were removed. Respondent has spent a significant amount of time in the United States; he first arrived in 1998 and has remained until the present.

Respondent has been a committed husband and father. He has provided emotional support to his wife throughout their marriage and did much of the household management and childcare. Respondent's wife's testimony indicating that Respondent continued to help his children with

their homework even while imprisoned shows a notable commitment to his children's education and their overall well-being.

Respondent has a stable work history, but the Court will only consider that to be a favorable factor in part because his work history is integrally tied to his wire fraud conviction. Respondent has a job offer with an information technology company, his field of expertise, and therefore would likely be able to provide adequately for his family.

Respondent has never served in the United States military, nor does he own any businesses or property, other than two vehicles and a few computers. The record does not reflect that Respondent was involved in the community.

This Court considers Respondent's wire fraud conviction to be a significant adverse equity. Respondent created fictitious client companies for payroll loans which resulted in a loss of $946,220 to Sterling National Bank. Ex. 3-D. This Court also believes, however, that Respondent has demonstrated genuine rehabilitation. Respondent expressed deep regret over his actions and the heavy toll it has taken on his family, particularly his wife. Respondent was very emotional as he explained the impact his actions have had on his family's financial state and his wife's emotional and psychological suffering. He stated that he had ruined her life and put her through torture.

The Court also notes that although Respondent carried out the wire fraud for a period of several years, Respondent did ultimately turn himself in to the bank prior to his actions being discovered by anyone. There is nothing in the record which indicates Respondent tried to hide information or evade responsibility. In fact, the pre-sentence investigation report provided by the DHS stated that Respondent entered a timely plea of guilty to Count 1 of the Information, that Respondent accepted responsibility for the offense, and that he assisted authorities in the investigation and prosecution of his own misconduct. Ex. 3-D. In addition, the Court notes that Respondent has no prior or subsequent criminal history outside of his wire fraud conviction.

In short, while the Court recognizes the severity of Respondent's wire fraud conviction, the Court believes Respondent's positive factors slightly outweigh his adverse factors in this case. Accordingly, the Court finds Respondent ineligible for the § 212(h) Waiver of Inadmissibility and consequently his application for re-adjustment of status under § 245(a) is denied. However, if Respondent had been found eligible, the Court would grant re-adjustment of status with the § 212(h) waiver as a matter of discretion.

IV. CONCLUSION

For the foregoing reasons, Respondent's application for readjustment of status in conjunction with a § 212(h) Waiver of Inadmissibility is DENIED.

The following orders shall be entered:

[redacted]286
V[redacted]-R[redacted]

ORDERS

IT IS ORDERED that the Department of Homeland Security's Motion to Pretermit is **GRANTED;**

IT IS FURTHER ORDERED that Respondent's application for re-adjustment of status in conjunction with a § 212(h) Waiver of Inadmissibility is **DENIED;**

IT IS FURTHER ORDERED that Respondent's application for re-adjustment of status under INA § 245(a) is **DENIED;**

IT IS FURTHER ORDERED that Respondent be **REMOVED** from the United States to Sri Lanka.

12-8-296
DATE

Kuyomars "Q" Golparvar
U.S. Immigration Judge

Both parties have the right to appeal the Court's decision. The Notice to Appeal must be filed with the BIA within thirty (30) days of the issuance of this decision.

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer (M) ALIEN's ATT/REP (M) DHS
DATE: 12-9-16 BY: COURT
STAFF BLS

Attachment(s): ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other

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