U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H2

DATE: NOV 01 2012 Office: Baltimore, MD FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore Field Office, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Vietnam who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. The applicant is the spouse and parent of U.S. citizens. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in conjunction with an application for adjustment of status, in order to remain in the United States as a lawful permanent resident.

The AAO notes that although the applicant's Form I-290B, Notice of Appeal or Motion, was filed and signed by counsel, it appears that the applicant is now self-represented. The record does not contain a new, fully executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, filed with or after the filing of the Form I-290B, as required by regulation and as set forth in the instructions to the Form I-290B. 8 C.F.R. § 292.4(a). In a facsimile sent September 12, 2012, counsel was afforded 15 calendar days to provide a new Form G-28 to the AAO, but one has not been submitted. All representations, including those by counsel, will be considered, but the decision of the AAO will be furnished only to the applicant, who made an inquiry on the status of his appeal in written correspondence, dated April 21, 2011.

The director, in his decision dated August 23, 2010, found that the applicant had failed to establish that the bar to his admission would result in extreme hardship to the qualifying relative, as required under section 212(h)(1)(B) of the Act, and denied his Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, counsel asserted that the director erred in failing to consider the applicant's eligibility for a waiver under section 212(h)(1)(A) of the Act, since the criminal conduct for which he was found inadmissible occurred more than fifteen years ago. Alternatively, counsel contended that the applicant established that refusal of his admission would result in extreme hardship to his qualifying relative. *Form I-290B, Notice of Appeal or Motion*, dated September 2, 2010; *Statement of Counsel*, dated September 30, 2010.

The record of evidence includes, but is not limited to, counsel's statement; statement of the applicant's statement from his wife; letters from the applicant's wife's psychiatrist, and the applicant's immigration and criminal records. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The record reflects that the applicant was admitted to the United States on September 28, 1984 as a refugee pursuant to section 207 of the Act when he was [redacted]. He was granted adjustment of status as of September 28, 1984 on April 22, 1986 under section 209(a) of the Act. The record discloses that since his adjustment, the applicant has been arrested on numerous occasions between 1989 and 1993. On October 6, 1989, he was arrested in Fairfax, Virginia and was convicted of felony Grand Larceny in violation of section 18.2-95 of the Virginia Code (Va. Code) on February 9, 1990. He was sentenced to a term of two years, all of which was suspended except for any time served, and one year probation. On December 10, 1993, the criminal court revoked the original suspended sentence and resentenced him to serve the two year term of imprisonment. The record also indicates that the applicant was convicted again of felony Grand Larceny on June 19, 1990, resulting from an arrest on February 21, 1990 for an offense committed on June 24, 1988. He was sentenced to a suspended term of ten years and four years of probation.

The applicant thereafter departed the United States to visit his ailing father in Vietnam, and sought admission to the United States as a returning lawful permanent resident on or about September 9, 1993. Based on an outstanding warrant for the applicant for violation of probation, he was detained. The applicant was found excludable under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of crimes involving moral turpitude, and was placed into Exclusion Proceedings, based on the aforementioned convictions. After a hearing on the merits, the Immigration Judge denied the applicant's applications for a waiver under section 212(c) of the Act, asylum, and withholding of removal under section 241(b)(3) of the Act on October 27, 1994, and ordered the applicant excluded.[1] The former Immigration and Naturalization Service (INS) was unable to execute the order of exclusion, and eventually paroled the applicant out of immigration custody on September 25, 1997.

As the applicant has not disputed inadmissibility on appeal, and the record does not show the finding of inadmissibility to be in error, we will not disturb the determination that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude, based on his felony Grand Larceny convictions.

Section 212(h) of the Act provides, in pertinent part:

> The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --
>
> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or

[1] We note that the applicant's exclusion order does not render him ineligible to adjust his status before INS (now United States Citizenship and Immigration Service (USCIS)). *Matter of C-H-*, 9 I&N Dec. 265 (R.C. 1961) (applicant with an exclusion order, who has been inspected or paroled, is not precluded from seeking adjustment before the former INS).

adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

...

No waiver shall be provide under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully 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 of proceedings to remove the alien from the United States.

At the outset, we note that the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Thus, although the director did not address the issue, we consider the applicant's eligibility for a waiver under section 212(h)(1)(A) of the Act under the AAO's *de novo* authority.

However, a waiver under any subsection of section 212(h) is not available to an alien "who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or" has not had the requisite seven years of continuous lawful residence. INA § 212(h)(2), 8 U.S.C. § 1182(h)(2). The record indicates that after his adjustment of status, the applicant had two convictions for felony Grand Larceny, which qualify as aggravated felonies under section 101(a)(43)(G) of the Act, as they constitute theft offenses for which the term of imprisonment was at least one year. The AAO must, therefore, first determine whether the applicant's aggravated felony convictions render him statutorily ineligible for a waiver under section 212(h) of the Act.

The Board of Immigration Appeals (Board) has found that aliens, who were convicted of an aggravated felony after acquiring lawful permanent residence, whether by adjustment of status or through a port of entry, are disqualified from receiving a 212(h) waiver based on the statutory exception set forth above. *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010). The applicant's case, however, falls within the jurisdiction of the Court of Appeals for the Fourth Circuit (Fourth Circuit), which has specifically rejected the Board's interpretation in *Koljenovic* and held that the above statutory exceptions only apply to those aliens who were previously admitted as lawful permanent residents at a port of entry. *See Bracamontes v. Holder*, 675 F.3d 380, 389 (4th cir. 2012) (finding that alien who was convicted of an aggravated felony after adjusting his status remains eligible for a waiver under section 212(h) of the Act). The Board subsequently limited its holding in

Koljenovic as precedential only in jurisdictions outside the Fourth, Fifth, and Eleventh Circuits. *See Matter of Rodriguez*, 25 I&N Dec. 784 (BIA 2012). Accordingly, the AAO finds that the applicant's aggravated felony convictions do not render him statutorily ineligible for a 212(h) waiver, because prior to those convictions, he had acquired his lawful permanent resident status through adjustment, rather than at a port of entry.

We now turn to the applicant's contention that he is eligible for a waiver under subsection of (1)(A) of section 212(h) of the Act. Pursuant to section 212(h)(1)(A) of the Act, the ground of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act may be waived in the exercise of discretion, if the applicant demonstrates that the activities for which he is inadmissible occurred more than 15 years before the date of his application for a visa, admission, or adjustment of status. In addition, the applicant must demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated in order to qualify for a waiver under this provision.

The record demonstrates that the applicant's criminal conduct leading to his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act occurred more than 15 years ago. An application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). We consider whether the applicant's admission to the United States would be contrary to the national welfare, safety, or security of the United States, and if he has been rehabilitated.

The record discloses that the applicant was arrested at least 13 times within a span of three to four years between 1989 and 1992 in Virginia and Massachusetts, mostly involving theft offenses. During that period, in addition to the previously referenced felony Grand Larceny convictions in Virginia, the applicant also has two larceny convictions and one shoplifting conviction in Massachusetts, for all of which he was sentenced to probation. The remaining arrests all resulted in charges that were dismissed or not prosecuted, including an arrest for armed assault in Massachusetts. The record does not disclose any further arrests following his release from immigration custody in 1997. The record also indicates that the applicant has diligently complied with reporting requirements imposed upon his release from immigration custody and has reported his changes of address with immigration officials as required.

The evidence demonstrates that the applicant has continuously resided in the United States since 1986 when he [redacted]. He has significant family ties in the United States, including his citizen wife, two children, ages ten and six years old respectively, his sisters, and his aunt. The applicant's wife indicates in her letter that she has been married to the applicant for over eight years and that he is a loving and caring husband and father. She claims she is emotionally and financially dependent on him. Her letter indicates her awareness of her husband's criminal history and she explains that her husband's problems arose from his youth and the wrong group of friends with whom he associated at that time. The applicant's wife further states that she is fearful and has nightmares about her husband being deported to Vietnam. She states that whenever her husband goes to report to immigration authorities, she is afraid that he will not return.

The record also contains letters from the applicant's wife's psychiatrist, [redacted], who indicates she has been treating the applicant's wife for anxiety and depression, which was linked to the possibility of her husband being deported. [redacted]notes that the applicant's wife reported that

her anxiety over her husband's possible deportation has adversely affected her ability to provide for the well-being of her children.

The AAO finds that the record indicates that the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States and that he has been rehabilitated, as required by section 212(h)(1)(A) of the Act. The applicant is the husband of a U.S. citizen and the father of two U.S. citizen children. The supporting statement from the applicant's wife in the record attests to the applicant's rehabilitation and close ties to his family who reside in the United States. The record indicates that the applicant is gainfully employed and financially supports his family, and shows that refusal of his admission would result in psychological and financial hardship on his family. The applicant has not been convicted of a violent or dangerous crime. His convictions involved theft and are remote in time, having occurred over 15 years ago, when he was a young adult. Since his release from immigration custody, he has complied with the conditions of his release, including having to report on a monthly basis in more recent years. Based on the foregoing, the applicant has established that he has been rehabilitated and that he otherwise meets the requirements of a waiver under section 212(h)(1)(A) of the Act.

Furthermore, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. The negative factors are his convictions for theft and his prior exclusion order. The favorable factors include the applicant's rehabilitation; the applicant's family ties in the United States; the hardships his citizen wife and children would face if he was refused admission; and the passage of 17 years since his last conviction on December 10, 1993 for felony Grand Larceny. We note that the majority of these favorable factors did not exist at the time the Immigration Judge denied the applicant's application for a 212(c) waiver.

While the AAO cannot condone the applicant's criminal convictions and immigration violations, the AAO finds that the positive factors outweigh the negative and a positive exercise of discretion is appropriate in this case.

As we have found the applicant eligible for a waiver under section 212(h)(1)(A) of the Act, we find no purpose will be served in considering his eligibility for a waiver under subsection (h)(1)(B) of the same provision.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.