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

(b)(6)

U.S. Citizenship and Immigration Services

Date: APR 25 2014 Office: NEW DELHI, INDIA FILE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the Field Office Director, New Delhi, India, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Pakistan who was found by the field office director to be inadmissible under 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 been convicted of a crime involving moral turpitude. On May 5, 1994, the applicant adjusted to a lawful permanent residence based on his marriage to a U.S. citizen. On February 23, 1998, the applicant divorced his spouse. On January 18, 2000, the applicant was convicted of conspiracy to commit access fraud in violation of 18 U.S.C. § 371, and was sentenced to 12 months imprisonment. On February 15, 2001, an immigration judge ordered that the applicant be removed from the United States as an aggravated felon. On September 14, 2001, the Board of Immigration Appeals (Board) dismissed the applicant's appeal of the immigration judge's decision. On March 4, 2002, the applicant married his petitioning spouse, who filed a Petition for Alien Relative (Form I-130) on his behalf. On February 7, 2006, the applicant was removed to Pakistan.

The field office director stated that the applicant was seeking a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), and was statutorily ineligible for the waiver due to having been convicted of an aggravated felony after admission to the United States as a lawful permanent resident, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel cites *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008), and challenges the field office director's determination that the applicant is statutorily ineligible for a waiver of inadmissibility. Counsel argues that the Fifth Circuit Court of Appeals held that aliens who are admitted to the United States after inspection and only thereafter adjust to lawful permanent resident status are not deemed to have been "admitted" in that status for purposes of waiver eligibility under section 212(h) of the Act, and therefore are not barred from seeking a section 212(h) waiver of inadmissibility. 519 F.3d 532 at 542-546. Counsel asserts that Fifth Circuit precedent should control on the basis that Texas is the state in which the applicant's qualifying relative currently resides, where the applicant resided prior to removal, and where other actions and proceedings relevant to the case occurred. Counsel argues that the Board acknowledged in *Matter of Rodriguez*, 25 I&N Dec. 784, 788 (BIA 2012), that *Martinez* is controlling precedent in removal proceedings arising within the Fifth Circuit. Thus, counsel asserts that a section 212(h) waiver is available to the applicant. Counsel also challenges the director's determination that the applicant is inadmissible for unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

We will first address the finding of inadmissibility for having been convicted of a crime involving moral turpitude and the finding that the applicant was convicted of an aggravated felony.

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 on January 18, 2000 the applicant was convicted in the United States District Court Southern District of Texas of conspiracy to commit access device fraud in violation of 18 U.S.C. § 371. The judge sentenced the applicant to serve 12 months imprisonment and 3 years of supervised release, and ordered that the applicant pay restitution in the amount of $122,345.01.

At the time of the applicant's conviction, 18 U.S.C. § 371 stated:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
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> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i), includes as an aggravated felony an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."

As the applicant has not disputed on appeal that his offense is a crime involving moral turpitude as well as an aggravated felony under section 101(a)(43)(M)(i) of the Act, and the record does not show the finding of inadmissibility to be erroneous, we will not disturb the finding of the director.

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

> (h) 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 –
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> . . .
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> (1) (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 . . . . and
>
> (2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . . .
>
> No waiver shall be granted 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 seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

As to the aggravated felony bar, the Board in *Matter of Rodriguez* acknowledged that the Fifth Circuit in *Martinez* held that the section 212(h) aggravated felony bar applies only to aliens who have been lawfully admitted to the United States as permanent residents at a port of entry. 25 I&N Dec. 784 at 787 (citing *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010)). However, the Board disagreed with the Fifth Circuit's interpretation of section 212(h) of the Act, and held that in jurisdictions where controlling circuit law does not forbid them from doing so, they would continue to hold, in accordance with the reasoning in *Matter of Koljenovic*, that section 212(h) of the Act bars relief for any alien who has been convicted of an aggravated felony after acquiring lawful permanent resident status, without regard to the manner in which such status was acquired. 25 I&N Dec. 784 at 789. Thus, as to the applicant's case, in view of the holding in *Matter of Rodriguez,* section 212(h) relief would be unavailable to the applicant.

Counsel contends that the applicant's case is within the jurisdiction of the Fifth Circuit and that *Martinez* is controlling precedent in view of the applicant's connections to the state of Texas, and that venue is the standard against which the AAO should determine the substantive laws for the applicant's case. However, the venue statutes do not confer jurisdiction, and the applicant resides overseas, outside the jurisdiction of Fifth Circuit. *See Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604, 608 (1978). The applicant's removal proceedings have been completed, and the applicant's appeal of the immigration judge's decision was dismissed by the Board on September 14, 2001. The present appeal before the AAO is not part of or relevant to the applicant's removal proceedings. In I-601 cases involving applicants residing overseas, such as the present case, the AAO applies as controlling decisions of the Board and the U.S. Supreme Court. Accordingly, in view of the decisions of the Board in *Matter of Koljenovic* and *Matter of Rodriguez,* in which the Board held that section 212(h) relief is unavailable to any alien who has been convicted of an aggravated felony after acquiring lawful permanent resident status, regardless of the manner in which such status was acquired, the applicant in the instant case is statutorily ineligible for relief under section 212(h) of the Act.

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. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.