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

(b)(6)

U.S. Citizenship and Immigration Services

Date: NOV 0 7 2014 Office: NEBRASKA SEVICE CENTER 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 Director, Nebraska Service Center, denied the waiver application and an appeal was dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO on motion. The motion will be granted and the previous decision of the AAO is affirmed.

The applicant is a native and citizen of Nicaragua who was found 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 December 12, 1990, the applicant adjusted to lawful permanent resident status pursuant to Section 245A of the Act. On December 13, 1996, the applicant was convicted of Conspiracy to Obstruct Commerce Robbery in violation of 18 U.S.C. § 1951, and was sentenced to more than one year imprisonment. On January an immigration judge ordered that the applicant be removed from the United States as an aggravated felon. On March 25, 1999, the applicant was removed from the United States.

The director determined that the applicant was seeking a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), but 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. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly.

On appeal, we concurred with the director that the applicant was statutorily ineligible for a waiver of inadmissibility pursuant to section 212(h) of the Act due to having been convicted of an aggravated felony after admission to the United States as a lawful permanent resident. The appeal was consequently dismissed.

On appeal, counsel cites *Matter of Rodriguez,* 25 I&N Dec. 784 (BIA 2012) and *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. Counsel asserts that Fifth Circuit precedent should control on the basis that Louisiana is the state where the applicant was ordered removed. Counsel argues that the Board of Immigration Appeals (BIA) acknowledged in *Matter of Rodriguez* 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. The entire record was reviewed and considered in rendering 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 –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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
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> (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. . . .
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> 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.

On motion, the applicant does not dispute that he is inadmissible for having been convicted of a crime involving moral turpitude. The applicant also does not dispute that he was convicted of an aggravated felony after admission to the United States as a lawful permanent resident. As the record does not show these findings to be erroneous, we will thus not disturb the findings 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. . . .
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> 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.

The aggravated felony bar to a section 212(h) waiver relates specifically to individuals admitted as lawful permanent residents. An alien who was not previously admitted to the United States for lawful permanent residence, has never been a lawful permanent resident, and has an aggravated felony conviction is not precluded from applying for a section 212(h) waiver in conjunction with an application for adjustment of status. *See Matter of Michel*, 21 I&N Dec. 1101, 1104 (BIA 1998).

The BIA 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 BIA 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.[1] 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 Louisiana, and that venue is the standard against which we 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. The present appeal before us 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, we apply 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

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[1] On motion counsel asserts that the BIA incorrectly decided *Matter of Koljenovic*. We are bound by BIA decisions and are not in a position to debate their merits.

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 application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is granted, but the waiver application remains denied.