



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: APR 05 2013 OFFICE: SEOUL

FILE: [REDACTED]

IN RE: [REDACTED]

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:

[REDACTED]

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of South Korea 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 seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen mother.

The Field Office Director found that the applicant is not eligible for a waiver as he was convicted of an aggravated felony after being lawfully admitted to the United States for permanent residence. Further, the applicant had not lawfully resided continuously in the United States for seven years prior to the immigration proceedings resulting in his removal. The Field Office Director accordingly denied the Form I-601 application for a waiver. *Decision of the Field Office Director*, dated February 1, 2012.

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.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

(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 . . . .

Section 212(h)(2) of the Act also provides:

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 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

Section 101(a)(43) of the Act provides, in relevant part:

The term "aggravated felony" means -

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year

The record reflects that the applicant entered the United States as a lawful permanent resident on August 11, 1988. The applicant was subsequently convicted of two counts, burglary of a vehicle and theft, on May 18, 1992 in the Criminal District Court of [REDACTED], Texas. The applicant was sentenced to five suspended years of imprisonment and a fine. Based upon these convictions, the applicant was placed into immigration proceedings pursuant to an Order to Show Cause, served on the court on May 22, 1992. An immigration judge ordered the applicant deported on August 24, 1992 and the applicant was deported from the United States on January 20, 1993.

In accordance with section 101(a)(43)(G) of the Act, the applicant was convicted of two aggravated felonies, theft and burglary, following his entry into the United States as a lawful permanent resident. Further, the applicant had not lawfully resided continuously for a period of seven years following his entry into the United States as a lawful permanent resident on August 11, 1988 until the initiation of his immigration proceedings on May 22, 1992. As such, under section 212(h)(2) of the Act, the applicant is ineligible for a 212(h) waiver of inadmissibility on these two grounds.

Counsel for the applicant asserts that the charges against the applicant were dismissed so that he is no longer inadmissible and does not require a 212(h) waiver. The record contains an order from the Criminal District Court of [REDACTED] Texas, dated May 18, 1992, setting aside the applicant's convictions. The Board of Immigration Appeals has held that under the current statutory definition of conviction provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). In *Matter of Pickering*, the BIA stated that if a court vacates a conviction for reasons unrelated to a

procedural or substantive defect in the underlying criminal proceedings, the alien remains convicted for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). The applicant has not submitted any evidence indicating that the applicant's convictions were set aside based upon any procedural or substantive defect in his criminal proceedings. In fact, the court order submitted by the applicant indicates that his convictions were set aside because the applicant fulfilled the terms and period of his probation. Accordingly, in accordance with section 101(a)(48)(A) of the Act, the applicant remains convicted for immigration purposes.

Counsel also asserts that since the applicant pled guilty to his crimes prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), he should not be subject to section 101(a)(13) of the Act and charged as an arriving alien subject to a ground of inadmissibility. Counsel cites *Varelas v. Holder*, No 10-1211 (March 28, 2012), to support the applicant's assertion that the applicant is not subject to the 212(h)(2) waiver bars. However, the alien in *Varelas v. Holder* is a lawful permanent resident who committed a crime involving moral turpitude pre-IIRIRA, for which he was, post-IIRIRA, placed into removal proceedings after a brief and casual trip abroad. The Supreme Court held that Varelas's reentry into the United States would not have been considered an admission pre-IIRIRA, so the passage of IIRIRA retroactively extinguished his longstanding rights under the *Fleuti* doctrine. *Id*; *Rosenberg v. Fleuti*, 372 U.S. 449 (1963) (holding that lawful permanent residents are not regarded as making an "entry" to the United States returning from a brief, casual, and innocent trip abroad). Unlike the alien in *Varelas*, the applicant is not a lawful permanent resident returning to the United States after a brief and casual trip abroad. Rather, the applicant was placed in immigration proceedings following his convictions for crimes involving moral turpitude, ordered deported by an immigration judge, and deported from the United States on January 20, 1993. The applicant is now seeking admission to the United States through his application for an immigrant visa and waiver of inadmissibility.

Counsel contends that the applicant should also be permitted to seek his section 212(h) waiver *nunc pro tunc*, which may dispose of the charges against him. It is noted that the two cases cited by counsel to support this assertion only address an immigration judge's power to grant *nunc pro tunc* permission to reapply for admission in deportation proceedings where the only ground of deportability would be eliminated. *Matter of Ducret*, 15 I&N 602 (BIA 1976); *Matter of Vrettakos*, 14 I&N Dec. 593 (BIA 1973, 1974). The applicant is not in immigration proceedings before an immigration judge and he is not applying for permission to reapply for admission. Counsel does not address how a *nunc pro tunc* grant of an application would impact the applicant's ground of inadmissibility. Counsel further asserts that permitting a lawful permanent resident to apply for a waiver in deportation proceedings while denying an inadmissible lawful permanent resident, is a violation of the equal protection clause. The case cited by counsel, *Yeung v. INA*, 76 F.3d 337 (11th Cir. 1995), considers whether a section 212(h) waiver should be available in both deportation and exclusion immigration proceedings. Counsel does not address how *Yeung* is relevant to the applicant's situation, where he has not been denied the opportunity to apply for a section 212(h) waiver. Indeed, the applicant has applied for a section 212(h) waiver, but is barred due to his conviction for two aggravated felonies following his admission to the United States as a lawful permanent resident and his less than seven years of residence in the United States prior to

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his immigration proceedings. As such, the applicant remains inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has failed to overcome the basis of denial of his Form I-601 waiver application. The appeal will therefore be dismissed and the Form I-601 will be denied.

**ORDER:** The appeal is dismissed.