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U.S. Citizenship
and Immigration
Services

Date: **OCT 15 2014** Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Applicant: [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]

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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,

for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application for a waiver of inadmissibility was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica who was admitted to the United States as a lawful permanent resident on May 24, 1987. As a result of a criminal conviction for an aggravated felony, the applicant was placed in removal proceedings and subsequently removed from the United States on January 5, 2000. In applying for an immigrant visa based on a Petition for Alien Relative (Form I-130) filed by his United States citizen spouse, the applicant was found to be inadmissible to the United States 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. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse.

The director found the applicant ineligible for a waiver under section 212(h) of the Act because he had been convicted of an aggravated felony committed subsequent to his admission to the United States as a lawful permanent resident. The Applicant for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *See Decision of the Director* dated March 29, 2014.

On appeal counsel for the applicant asserts in the Notice of Appeal (Form I-290B) that the law did not intend to permanently bar anyone who ever committed an aggravated felony when they were a permanent resident of the United States and that the denial of the waiver application did not balance equities as required when exercising discretion. With the appeal counsel submits a brief. The record contains statements, financial documentation, medical documentation, and other evidence submitted in support of the waiver application. The entire record was reviewed and considered in rendering this decision.

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

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any 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, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record indicates that on July 13, 1993, the applicant was convicted in the 17th Circuit Court of the State of Florida of unemployment compensation fraud, a third degree felony, and was sentenced to one year of probation. The record further reflects that on March 16, 1998, the applicant was convicted in U.S. District Court for the Southern District of Florida for the offenses of "possession of 15 or more unauthorized access devices" in violation of 18 U.S.C. § 1029(a)(3) and for "possession of hardware and software used for altering and modifying cellular telephones" in violation of 18 U.S.C. §1029(a)(8). The applicant was sentenced to 13 months confinement for each violation served concurrently in U.S. federal prison and ordered to make restitution of \$239,025 and pay a special assessment of \$200. The director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. Counsel does not contest this finding of inadmissibility on appeal.

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 subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . 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 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.

In addition to the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, the director found the applicant's convictions to be aggravated felonies as defined in section 101(a)(43)(M) of the Act, which states that an aggravated felony is an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000. Counsel does not contest this determination on appeal.

On appeal counsel asserts that the applicant is not subject to the statutory bar under section 212(h) of the Act. Counsel asserts that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 paragraph regarding persons who are legal permanent residents and seek a waiver because of a crime relates to those who are in the United States or returning from a trip abroad. Counsel cites *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008)¹ in asserting that there have been extended discussions of "admission" and "lawful residence" but not for the situation of a lawful permanent resident who was deported, wishes to return to the United States, and needs a waiver. Counsel asserts that there is no interpretation that would bar a former permanent resident now eligible to return. Counsel also asserts that USCIS must balance the applicant's equities that include rehabilitation, family ties, and hardship to family members.

We find counsel's assertions unpersuasive. The aggravated felony bar to a section 212(h) waiver relates specifically to individuals admitted as lawful permanent residents and the statute clearly indicates that no waiver is available to an applicant who has been admitted as a lawful permanent resident, if either the applicant has been convicted of an aggravated felony after being admitted or the applicant has not resided continuously in the United States for seven years before he or she is placed in removal proceedings. An applicant 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). That is, an individual admitted as a nonimmigrant, who has never held lawful permanent resident status, and who has a conviction for a crime that would render him or her deportable as an aggravated felon, can

¹ In *Matter of Rotimi* the BIA noted the phrase "lawfully resided continuously" to be ambiguous. In its decision the court determined that an alien has not "lawfully resided" in the United States for purposes of qualifying for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), during any periods in which the alien was an applicant for asylum or for adjustment of status and lacked any other basis on which to claim lawful residence.

apply for a section 212(h) waiver in conjunction with an application for adjustment of status. In *Lanier v. US Attorney General*, 631 F.3d 1363 (11th Cir. 2011) the court allowed for section 212(h) waiver relief in the case of an applicant who had been convicted of an aggravated felony. However, in *Lanier*, the court distinguished between aliens such as Lanier, who had adjusted to the status of lawful permanent resident after being admitted to the United States in a different status and those who had been inspected and admitted as a lawful permanent resident at a port of entry. In the present case, the record reflects that the applicant was inspected and admitted as a lawful permanent resident at a port of entry on May 24, 1987. Because the applicant was subsequently convicted on March 16, 1998 of aggravated felonies, he is statutorily ineligible for a waiver under section 212(h) of the Act. Given that the applicant is statutorily ineligible for a waiver, no purpose would be served in determining whether his qualifying relatives are experiencing extreme hardship as a result of his inadmissibility or whether he would merit a waiver in the exercise of discretion.

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 appeal is dismissed.