Case Summary: Immigration Law Advisor

U.S. Department of Justice, Executive Office for Immigration Review

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In ***Matter of J-H-J-,*** **26 I&N Dec. 563 (BIA 2015),** the Board held that an alien who has been convicted of an aggravated felony is not barred from establishing eligibility for a waiver of inadmissibility under section 212(h) of the Act if the alien adjusted his status in the United States, rather than having entered as a lawful permanent resident. In so holding, the Board withdrew from its decisions in Matter of E.W. Rodriguez, 25 I&N Dec. 784 (BIA 2012), and Matter of Koljenovic, 25 I&N Dec. 219 (BIA 2010). The Board noted that the overwhelming majority of circuit courts to have addressed the issue have disagreed with the Board's prior position, which was that a section 212(h) waiver is not available to an alien who has been convicted of an aggravated felony since the time that he or she adjusted status in the United States. Instead, nine circuit courts have held that the plain language of section 212(h) only precludes aliens from establishing statutory eligibility for the waiver if they entered the United States as a lawful permanent resident and subsequently committed an aggravated felony. The Board concluded that it was appropriate to accede to the clear majority view of the circuit courts, noting that consistency is an important principle of immigration law.

The Board sustained the respondent's appeal and remanded the record for further proceedings, finding that she was statutorily eligible to seek a section 237(a)(1)(H) waiver. In reaching this conclusion, the 8 Board examined the history of the terms "entry" and "admission" as they have been employed in the Act. The Board noted that it had held in prior precedent decisions, including Matter of Alyazji, 25 I&N Dec. 397 (BIA 2011), and Matter of Rosas, 22 I&N Dec. 616 (BIA 1999), that adjustment of status may be the functional equivalent of an "admission" in certain cases. The Board also examined the legislative history of the waiver provision, including its evolution through a series of legislative amendments. The Board further noted that construing the term admission to include adjustment of status is consistent with the humanitarian goals behind the waiver's creation. The decision contained a dissenting opinion, noting that it was settled law prior to the most recent legislative amendments that the fraud waiver could only be sought to waive fraud that occurred at entry. The dissent acknowledged that the term "admission" has been held in other circumstances to include adjustment of status where doing otherwise would lead to absurd or bizarre results. However, the dissent did not find this to be the case with the current language of section 237(a)(1)(H) of the Act.