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Waivers of Inadmissibility for Lawful Permanent Residents Under Section 212(h) of the Act

by Christina Greer

Generally more protections and opportunities for relief are afforded to lawful permanent residents ("LPRs") at risk of removal than to nonimmigrants and aliens[1] who have entered the United States without inspection. For example, in removal proceedings, the burden is on the Department of Homeland Security ("DHS") to prove by clear and convincing evidence that an alien who has been admitted to the United States is removable. Section 240(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(3)(A). An unadmitted alien, on the other hand, bears the burden of demonstrating that he is lawfully present pursuant to a prior admission and is admissible to the United States. Section 240(c)(2) of the Act. Thus, Congress has provided more protections in removal proceedings to aliens who have been admitted to the United States than it has to unadmitted aliens.

Congress also made certain forms of relief, such as cancellation of removal, more accessible to LPRs than it has to non-LPRs, irrespective of whether a non-LPR has been admitted. For instance, an otherwise eligible LPR only has to show 7 years of continuous residence in the United States to be eligible for cancellation of removal. But a non-LPR must show 10 years of continuous physical presence and exceptional and extremely unusual hardship to a qualifying relative. *Compare* sections 101(a)(33) and 240A(a)(2) of the Act, 8 U.S.C. §§ 1101(a)(33) and 1229b(a)(2), *with* sections 240A(b)(1)(A) and (2)(B) of the Act.[2] *But see* sections 240A(b)(2)(A)(ii) and (v) of the Act (providing cancellation of removal to certain battered spouses and children, irrespective of their LPR or non-LPR status, if they establish, inter alia, that they have 3 years of continuous physical presence in the United States and that their removal would cause extreme hardship to a qualifying relative).

However, LPRs seeking to waive certain grounds of inadmissibility through a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), are

subject to stricter requirements than non-LPRs. In fact, in some circuits, certain aliens who are admitted as LPRs at a port of entry may be ineligible for such a waiver while similarly situated aliens who adjusted to LPR status in the United States are eligible. There has also been confusion regarding the applicability of the section 212(h) waiver to LPRs in other situations. For example, is a section 212(h) waiver available nunc pro tunc to an LPR who traveled abroad and was readmitted after the commission of an offense giving rise to inadmissibility? Can a waiver under section 212(h) be used to waive criminal bars to cancellation of removal? Can an LPR obtain such a waiver without concurrently applying for admission or adjustment of status under section 245 of the Act, 8 U.S.C. § 1255?

It is unclear what reasons Congress may have had when it drafted section 212(h) for distinguishing between LPRs and non-LPRs and arguably distinguishing between aliens admitted at a port of entry as LPRs and those who adjusted to LPR status. In any case, these classes of aliens have been treated differently through the way the statute has been interpreted, applied, and amended since its enactment, which, in one instance, has led to conflicting case law.

Overview

Section 212(h) of the Act provides for a waiver of certain criminal grounds of inadmissibility for both LPRs and non-LPRs, including grounds relating to crimes involving moral turpitude (section 212(a)(2)(A)(i)(I)); certain controlled substance offenses (section 212(a)(2)(A)(i)(II)); two or more criminal convictions for which the aggregate sentences of confinement are 5 years or more (section 212(a)(2)(B)); and prostitution and commercialized vice (section 212(a)(2)(D)).

The section 212(h) waiver is generally available to aliens in two circumstances. *See Matter of Mendez*, 21 I&N Dec. 296, 299 (BIA 1996). First, the waiver is available if the offense that renders the alien inadmissible occurred more than 15 years "before the date of the application for a visa, admission, or adjustment of status"; the alien's admission would not be contrary to the national welfare, safety, or security of the United States; the alien has been rehabilitated; and a waiver is warranted as a matter of discretion. Section 212(h)(1)(A) of the Act. Second, the waiver is available, irrespective of the time of the offense, if the alien can demonstrate that a denial of his or her admission to the United States would cause extreme hardship to a qualifying relative and that a visa, admission, or adjustment of status is warranted as a matter of discretion. Section 212(h)(1)(B) of the Act. These are the only requirements for non-LPRs applying for a section 212(h) waiver. LPRs, however, are subject to additional restrictions.

In addition to these requirements for section 212(h) eligibility, the statute adds the following exclusionary provision relative to LPRs:

> 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.

These prohibitions raise several questions. First, it is unclear whether the bars apply to all LPRs applying for a waiver or only to those LPRs who were admitted to the United States as LPRs at a port of entry. Second, section 212(h) does not specify whether an LPR must apply for a waiver in conjunction with an application for adjustment of status or whether it can be sought in conjunction with an application for another waiver or for cancellation of removal. Finally, there is an issue as to whether an LPR who has traveled abroad after the commission of an offense triggering inadmissibility can apply for a "stand alone" waiver under section 212(h) in removal proceedings if he or she was not placed in proceedings upon reentry into the United States.

Over the past 5 years, Board and circuit court precedent has better defined the limits and applicability of section 212(h) to LPRs. This article discusses that precedent and provides a guide for understanding the current state of the law relating to waivers for LPRs under section 212(h) of the Act. It will first provide background on the origin and development of the waiver

since its enactment in 1957. Then, the article will discuss recent developments in Board precedent regarding the applicability of section 212(h) in certain situations—such as when an LPR is eligible for the waiver in removal proceedings and whether the waiver may be used with other forms of relief. Next, the article will detail whether the exclusionary provision of section 212(h) applies to LPRs who entered the country subsequent to a procedurally regular, but substantively unlawful, admission. It will also discuss the circuit split and the split between the Board and six circuit courts regarding whether the exclusionary provision applies to aliens who adjusted to LPR status. The article concludes with a summary of the current state of the law and a discussion of the potential for future developments.

Background

Section 212(h) of the Act began as section 5 of the Act of September 11, 1957, Pub. L. No. 85-316, 71 Stat. 639, 640. As originally enacted, section 5 permitted the waiver of excludability grounds relating to crimes involving moral turpitude, convictions for two or more crimes for which the aggregate sentences to confinement actually imposed were 5 years or more, and prostitution. 8 U.S.C. § 1182b (1958).[3] To be eligible for the waiver, an otherwise admissible applicant had to demonstrate that his or her exclusion would cause extreme hardship to a qualifying relative; that the applicant's admission would not be contrary to the national welfare, safety, or security of the United States; and that the applicant warranted a favorable exercise of discretion. *Id.* The waiver also required that the Attorney General consent "to the alien's applying or reapplying for a visa and for admission to the United States." *Id.* The statute did not draw any distinctions between LPRs and non-LPRs.

Congress subsequently amended section 212(h) of the Act in 1990, and technical changes were made by an amendment in 1991. Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, § 601(d)(4), 104 Stat. 4978, 5076-77 (effective Nov. 29, 1990), *as amended by* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 307(f), 105 Stat. 1733, 1755 (effective as if included in IMMACT 90). The enactment of these two laws greatly changed the scope of the section 212(h) waiver. First, a provision was added that allowed waivers for certain individuals excludable for conduct stemming from prostitution-related activity or other excludable activity, regardless of hardship to a qualifying relative, if that activity occurred more than 15 years before the application. This provision also required an applicant to show that his or her admission would not be contrary to the national welfare, safety, and security of the United States; that he or she had been rehabilitated; and that a favorable exercise of discretion was warranted. 8 U.S.C. § 1182(h)(1)(A) (1994). Second, these amendments added a provision barring aliens from being granted waivers if they had committed or admitted committing acts that constituted "murder or criminal acts involving torture." Third, they added a requirement that the Attorney General, in the exercise of discretion, consent to the alien's application to adjust status, thus extending the application of section 212(h) of the Act to aliens applying for adjustment of status in addition to those applying or reapplying for a visa and for admission to the United States.

Finally, section 348(a) of the Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639, added a provision to the end of section 212(h) restricting the availability of the waiver. This exclusionary provision, discussed in the overview above, bars certain LPRs who have been convicted of an aggravated felony or who have not accrued 7 years of continuous residence in the United States from receiving the waiver.

When Can an LPR Apply for a Section 212(h) Waiver?

The Board interpreted a previous version of section 212(h) as allowing for waivers nunc pro tunc to aliens in deportation proceedings who were inadmissible at the time of their most recent entry into the United States and were subsequently placed in proceedings. *See Matter of P-*, 7 I&N Dec. 713 (BIA 1958). The Board recently reconsidered that rule in light of statutory changes to section 212(h) and the Supreme Court's decision in *Judulang v. Holder*, 132 S. Ct. 476 (2011), and found that nunc pro tunc waivers are no longer authorized under section 212(h) of the Act. *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013). Additionally, the Board's decisions have emphasized that section 212(h) waivers are only available to LPRs and non-LPRs who are seeking a visa, admission to the United States, or adjustment of status. *See id.* at 131 (citing section 212(h)(2) of the Act); *Matter of Y-N-P-*, 26

I&N Dec. 10, 12 (BIA 2012); *Matter of Bustamante*, 25 I&N Dec. 564, 567 (BIA 2011); *Matter of Abosi*, 24 I&N Dec. 204, 205 (BIA 2007).

Nunc Pro Tunc Waivers Under Section 212(h) of the Act

In 1958, less than a year after section 5 of the Act of September 11, 1957, became law, the Board held that LPRs in deportation proceedings (as opposed to exclusion proceedings) could obtain waivers under section 5 nunc pro tunc to cure a ground of inadmissibility that existed at an alien's time of reentry into the United States if the alien was otherwise admissible and the reentry occurred after the statute's effective date. *Matter of P-*, 7 I&N Dec. at 714. When *Matter of P-* was decided, the language of the waiver required that the Attorney General consent "to the alien's applying or reapplying for a visa and for admission to the United States." 8 U.S.C. § 1182b (1958). Based on this language, the Board found that a special inquiry officer (now an Immigration Judge) had nunc pro tunc authority to grant a waiver as of the alien's most recent reentry and thus to deem him or her to have been lawfully admitted as of that entry. *See also Matter of Sanchez*, 17 I&N Dec. 218, 222 (BIA 1980) (citing *Matter of P-* for the proposition that a waiver under section 5 can be granted nunc pro tunc to an LPR in deportation proceedings to cure a ground of inadmissibility that existed at the time of the alien's entry); *Matter of Millard*, 11 I&N Dec. 175, 177 (BIA 1965) (same).

In *Matter of Rivas*, 26 I&N Dec. at 134, the Board overruled *Matter of Sanchez* and *Matter of P-*, holding that aliens in removal proceedings could *not* seek a waiver under section 212(h) of the Act nunc pro tunc. Rivas was admitted to the United States as an LPR on August 11, 1998. He was later convicted of two theft offenses and conceded that he was removable under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii). Rivas applied for a "stand alone" waiver under section 212(h) of the Act, which the Immigration Judge granted. The Immigration Judge determined that because Rivas departed and reentered the United States after his convictions, he was inadmissible at the time of his most recent reentry into the United States and would have qualified for a section 212(h) waiver at the time of that reentry. The Immigration Judge therefore granted the waiver nunc pro tunc to cure Rivas' inadmissibility at the time of his most recent reentry per *Sanchez*.

The DHS appealed, arguing that LPRs, like non-LPRs, can apply for section 212(h) waivers only when also applying for admission or adjustment of status. The Board agreed and overruled *Matter of Sanchez* based on the changes in the statute instituted by IMMACT 90 and IIRIRA, which amended the requirements for a section 212(h) waiver. The Board found that these new requirements differed from those in effect for section 5 relief when *Sanchez* was decided and concluded that the amended language no longer supported the reasoning of that decision.

Specifically, the Board held that IMMACT 90's change to section 212(h) clarified the waiver's applicability and rendered nunc pro tunc waivers incongruous with the plain language of the statute. Prior to IMMACT 90, waivers were available when the Attorney General "consented to the alien's *applying or reapplying for a visa and for admission* to the United States." 8 U.S.C. § 1182(h) (1988). IMMACT 90 added the phrase "or adjustment of status" to the end of this provision. Although slight, this change was nonetheless significant because it clarified the situations in which waivers are available—where the applicant is seeking admission or where he is an applicant for adjustment of status. The Board found that the revision rendered the provision "far more precise regarding the eligibility criteria for a section 212(h) waiver." *Matter of Rivas*, 26 I&N Dec. at 133.

The Board also found the Supreme Court's holding in *Judulang* instructive in determining whether a section 212(h) waiver was available nunc pro tunc. 132 S. Ct. 476 (regarding the availability of relief under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (repealed 1996)). In *Judulang*, the Supreme Court discussed the Attorney General's decision in *Matter of L-*, 1 I&N Dec. 1 (BIA, A.G. 1940). There, the Attorney General determined that he could exercise discretion to grant a section 212(c) waiver of inadmissibility nunc pro tunc to an alien who committed an offense giving rise to inadmissibility before departing from and reentering the United States if the alien would have qualified for the waiver as of his or her most recent reentry. Granting the waiver nunc pro tunc placed the alien back into the position of an arriving alien seeking admission and waived the inadmissibility as of the most recent admission. In the context of section 212(c) relief, the Supreme Court in *Judulang* found that this approach violated equal protection because eligibility for a section 212(c) waiver would depend on nothing

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CIRCUIT COURT DECISIONS FOR MARCH 2014

by John Guendelsberger

The United States courts of appeals issued 202 decisions in March 2014 in cases appealed from the Board. The courts affirmed the Board in 170 cases and reversed or remanded in 32, for an overall reversal rate of 15.8%, compared to last month's 11.2%. There were no reversals from the First, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for March 2014 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	1	1	0	0.0
Second	51	49	2	3.9
Third	14	12	2	14.3
Fourth	12	11	1	8.3
Fifth	21	21	0	0.0
Sixth	7	7	0	0.0
Seventh	7	4	3	42.9
Eighth	7	7	0	0.0
Ninth	66	42	24	36.4
Tenth	3	3	0	0.0
Eleventh	13	13	0	0.0
All	202	170	32	15.8

The 202 decisions included 102 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture ("CAT"); 44 direct appeals from denials of other forms of relief from removal or from findings of removal; and 56 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	102	82	20	19.6
Other Relief	44	36	8	18.2
Motions	56	52	4	7.1

The 20 reversals or remands in asylum cases involved particular social group membership (8 cases), credibility (2 cases), level of harm for past persecution (4 cases), well-founded fear (4 cases), impermissible fact-finding by the Board, and CAT.

The eight reversals or remands in the "other relief" category addressed crimes involving moral turpitude (two cases), application of the modified categorical approach, admissibility of a U-visa applicant, ineffective assistance of counsel, the smuggling bar, the section 212(h) waiver, and impermissible fact-finding by the Board.

The four motions cases involved changed country conditions, particular social group, adequacy of notice of hearing, and weight to be afforded to affidavits in support of motions to reopen.

The chart below shows the combined numbers for January through March 2014 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	14	11	3	21.4
Ninth	250	197	53	21.1
Third	42	35	7	16.7
Tenth	10	9	1	10.0
Fourth	42	38	4	9.5
Fifth	55	50	5	9.1
Second	108	99	9	8.3
Sixth	25	24	1	4.0
First	4	4	0	0.0
Eighth	16	16	0	0.0
Eleventh	25	25	0	0.0
All	591	508	83	14.0

Last year's reversal rate at this point (January through March 2013) was 14.2%, with 521 total decisions and 74 reversals.

The numbers by type of case on appeal for the first 3 months of 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	302	251	51	16.9
Other Relief	120	98	22	18.3
Motions	169	159	10	5.9

CIRCUIT COURT DECISIONS FOR APRIL 2014

by John Guendelsberger

The United States courts of appeals issued 189 decisions in April 2014 in cases appealed from the Board. The courts affirmed the Board in 163 cases and reversed or remanded in 26, for an overall reversal rate of 13.8%, compared to last month's 15.8%. There were no reversals from the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for April 2014 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	6	6	0	0.0
Second	39	35	4	10.3
Third	9	7	2	22.2
Fourth	8	8	0	0.0
Fifth	12	12	0	0.0
Sixth	13	13	0	0.0
Seventh	4	4	0	0.0
Eighth	6	6	0	0.0
Ninth	80	60	20	25.0
Tenth	6	6	0	0.0
Eleventh	6	6	0	0.0
All	189	163	26	13.8

The 189 decisions included 105 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 34 direct appeals from denials of other forms of relief from removal or from findings of removal; and 50 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	105	88	17	16.2
Other Relief	34	28	6	17.6
Motions	50	47	3	6.0

The 17 reversals or remands in asylum cases involved credibility (6 cases), nexus (3 cases), level of harm for past persecution (2 cases), corroboration requirements, particularly serious crime bar, particular social group, relocation possibilities, disfavored group analysis, and impermissible fact-finding by the Board.

The six reversals or remands in the "other relief" category addressed application of the modified categorical approach (two cases), crimes involving moral turpitude, good moral character, continuance for new counsel, and continuous physical presence for cancellation of removal.

The three motions cases involved changed country conditions (two cases) and the weight to be afforded to affidavits in support of motions to reopen.

The chart below shows the combined numbers for January through April 2014 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	330	257	73	22.1
Third	51	42	9	17.6
Seventh	18	15	3	16.7
Second	147	134	13	8.8
Fourth	50	46	4	8.0
Fifth	67	62	5	7.5
Tenth	16	15	1	6.3
Sixth	38	37	1	2.6
First	10	10	0	0.0
Eighth	22	22	0	0.0
Eleventh	31	31	0	0.0
All	780	671	109	14.0

Last year's reversal rate at this point (January through April 2013) was 13.9%, with 697 total decisions and 97 reversals.

The numbers by type of case on appeal for the first 4 months of 2014 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	407	339	68	16.7
Other Relief	154	126	28	18.2
Motions	219	206	13	5.9

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Supreme Court:

United States v. Castleman, 134 S. Ct. 1405 (2014): The Supreme Court reversed a decision of the Sixth Circuit in a criminal case in which the defendant moved to dismiss his indictment. The defendant was indicted under 18 U.S.C. § 922(g)(9), which forbids a person convicted of a "misdemeanor crime of domestic abuse" from possessing a firearm. The Sixth Circuit affirmed a district court determination granting the defendant's motion. The defendant argued that his crime did not contain the requisite element of the use of physical force because he was convicted under a Tennessee statute requiring him to have caused bodily harm, which he claimed could be achieved without the use of force. The Supreme Court disagreed with the Sixth Circuit's determination that the degree of force required for a misdemeanor crime of domestic violence is the same as that for a violent felony under the Armed Career Criminal Act, namely, violent force. Rather, the Court concluded that the standard is the same as for common law battery—offensive touching. The Court therefore found that the defendant was convicted of a misdemeanor domestic assault offense because the State statute defines the element of "bodily injury" in a way that necessitates the use of force under the common law definition of that term. In footnote 4, the Court noted that nothing in its opinion casts doubt on its decision in *Johnson v. United States,* 559 U.S. 133 (2010), or the Board's decision in *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010). Specifically, the Court clarified that its "view that 'domestic violence' encompasses acts that might not constitute 'violence' in a nondomestic context does not extend to a provision like [section 237(a)(2)(E)(i) of the Act], which specifically defines 'domestic violence' by reference to a generic 'crime of violence.'" The majority opinion, which reversed and remanded the record, was authored by Justice Sotomayor. There are two concurring opinions, by Justices Scalia and Alito (in which Justice Thomas joined).

First Circuit:

Thapaliya v. Holder, No. 13-1582, 2014 WL 1624177 (1st Cir. Apr. 24, 2014): The First Circuit denied the petition for review of a denial of asylum from Nepal. The petitioner's claim was based on a 2003 incident in which Maoist rebels came to his family home and severely beat the petitioner and pointed a gun at him. The Immigration Judge found that the petitioner had not suffered past persecution, determining that the beating was an isolated event in which the Government neither participated nor acquiesced. The Immigration Judge found no well-founded fear of persecution because the petitioner waited more than a year to depart the country without any further problems, and his family (including his father, the intended target of the 2003 attack) has remained in Nepal without suffering additional harm. The Board affirmed. The court held that the Immigration Judge's finding was consistent with the circuit's case law that isolated beatings (even if severe) generally do not establish the systemic mistreatment needed to show past persecution. The court further found that the record did not establish that the 2003 incident included a death threat against the petitioner sufficient to raise the mistreatment to the level of persecution. The court therefore noted that in the absence of past persecution, no rebuttable presumption of future persecution was triggered. The court agreed that because the petitioner remained for more than a year in Nepal following the 2003 incident, and his family members presently remain there unharmed (in spite of the fact that in 2008 the Maoists took control of the Government in Nepal), substantial evidence supported the Board's conclusion that the petitioner had not established a well-founded fear of persecution.

Marsadu v. Holder, 748 F.3d 55(1st Cir. 2014): The First Circuit denied the petition for review of the Board's denial of a motion to reopen removal proceedings. The petitioners are a husband and wife who claimed asylum from their native Indonesia on account of their Christian religious beliefs. After the Board affirmed the Immigration Judge's denial of their applications for relief, the circuit court denied their request for review in 2009. In July 2012, the petitioners moved the Board to reopen, claiming changed conditions in Indonesia. The petitioners largely relied on an expert affidavit to establish an increase in attacks on Christians by radical Islamists, towards which the Indonesian Government had become increasingly tolerant. In denying the motion, the Board found that the evidence did not establish an individualized threat to the petitioners themselves, nor was it sufficient to establish a pattern or practice of persecution against Christians in Indonesia. Furthermore, the Board did not find that the evidence established a change in conditions,

noting that similar violence was occurring at the time of the petitioners' 2007 hearing. The court found that the Board did not abuse its discretion in concluding that, in spite of the expert's claim to the contrary, the new evidence did not establish an "intensification or deterioration of country conditions" from those that existed in 2007 sufficient to warrant reopening. The court was not persuaded by the petitioners' argument that the Board's succinct summary of the expert's 38-page affidavit meant that the Board did not properly consider the report. Upholding the Board's conclusion that the evidence did not establish a pattern or practice of persecution, the court dismissed the petitioners' argument that the Board improperly relied on a 2009 circuit court decision finding no pattern or practice of persecution of Christians in Indonesia, rather than relying on evidence of present conditions. The court noted that by preceding the citation to that decision with the words "see, e.g.," the Board signaled that it was simply citing it as an example of a case reaching the same conclusion.

Ninth Circuit:

Ai Jun Zhi v. Holder, No. 10-71591, 2014 WL 1979308 (9th Cir. May 16, 2014): The Ninth Circuit granted the petition for review of the Board's decision affirming an Immigration Judge's denial of asylum from China. The petitioner claimed that while working abroad, he opened a bookstore in China, which his brother-in-law operated in his absence. He further claimed that the brother-in-law was arrested for 2 days for selling books relating to Falun Gong in the store. The petitioner was told that a warrant was issued for his own arrest and that he should never return to China. The Immigration Judge made an adverse credibility finding based on the fact that a letter from the petitioner's sister stated that the bookstore closed on February 13, 2005, but the petitioner and his mother put the date 1 year later. The Immigration Judge did not credit the petitioner's claim that the discrepancy was a typographical error. The Immigration Judge considered the discrepancy to be significant because (1) it was the sister's husband who managed the bookstore; (2) the petitioner relied heavily on the letter; and (3) the petitioner did not offer his explanation until questioned about it on cross-examination. The Immigration Judge's adverse credibility finding was also based on the petitioner's brief marriage to a U.S. citizen prior to his asylum application, which the Immigration Judge considered suspect. The court considered evidence of business receipts in the record establishing that the bookstore remained open through January 2006 and concluded that, in light of this significant evidence, no reasonable fact finder could have found that the discrepancy undermined the petitioner's veracity. Holding that the Immigration Judge's treatment of the petitioner's marriage was legal error, the court directed the consideration on remand of the fact that the petitioner's wife did not file a visa petition on his behalf. The court further considered the Immigration Judge's conclusion that the petitioner did not submit corroborative evidence to support his claimed fear of persecution. Relying on *Ren v. Holder*, 648 F.3d 1079, 1090-92 (9th Cir. 2011), which requires an Immigration Judge to provide "proper notice and a reasonable opportunity" to provide such corroborative evidence, the court concluded that notice was not provided to the petitioner, nor was the petitioner given the opportunity to explain why such evidence might be unavailable. The record was therefore remanded for further proceedings.

Chandra v. Holder, No. 10-70029, 2014 WL 1876270 (9th Cir. May 12, 2014): The Ninth Circuit granted the petition for review of the Board's decision denying a late-filed motion to reopen to apply for asylum based on the petitioner's change of religion. The petitioner had been denied asylum from his native Indonesia; the Board dismissed his appeal from that decision in 2003. In 2009, the petitioner moved the Board to reopen to allow him to file a new application for asylum based on his conversion to Christianity. The Board denied the motion as untimely, finding that the petitioner's personal changed circumstances arising in the U.S. did not satisfy the regulatory need for changed conditions in the country of nationality. The Ninth Circuit followed the Sixth, Seventh, and Eleventh Circuits in holding that the language of 8 C.F.R. §1003.2(c)(3)(ii) does not preclude an untimely motion based on both changed personal circumstances and changed country conditions. Thus, if the petitioner is able to establish changed conditions relating to Christians in Indonesia, he may additionally rely on the changed personal circumstance of his conversion to Christianity. The court distinguished motions based solely on a petitioner's changed personal circumstances. Noting that the petitioner supported his motion with substantial evidence of worsening conditions for Christians in Indonesia, the court remanded the record to the Board for consideration of that evidence.

Ming Xin He v. Holder, No. 09-73516, 2014 WL 1491882 (9th Cir. Apr. 17, 2014): The Ninth Circuit denied the

petition for review challenging the Board's denial of asylum and withholding of removal from China. The petitioner had arrived in the U.S. in 2004. His asylum claim was based on the coercive abortion and sterilization of his wife in 1992 (a fine was also assessed, of which the petitioner was able to pay less than half). Although at the time his application was filed, the spouse of a person subjected to a forcible abortion or sterilization was eligible for asylum status, the Attorney General issued *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008), while the petitioner's appeal was pending before the Board. The Immigration Judge had denied the claim based on an adverse credibility finding, but the Board held that the intervening case law prevented the petitioner from establishing asylum eligibility under the facts of his claim. The Board further found no factual basis that would establish that the petitioner had engaged in "other resistance" to China's coercive population control program sufficient to give rise to an independent claim under *Matter of J-S-*. The circuit court agreed with the Board that the petitioner's partial payment of the fine did not constitute "other resistance." Noting that the petitioner had testified that he would have paid the fine in full if he were able and that he came to the U.S. to earn the money to pay the remainder, the court cited the Board's decision in *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 637-38 (BIA 2008), in finding that the petitioner's actions were "grudging compliance," rather than resistance. Further, the facts that the petitioner was married while under age and had children sooner than allowed by law did not constitute resistance, where he sought to conceal his actions from the authorities, as opposed to displaying the required "'overt' and consistent defiance." The court also found that the petitioner did not establish that he had suffered past persecution. Although the petitioner argued that the economic consequences arising from the fine rose to the level of persecution, the court stated that the only evidence of the fine's effect was that (1) the petitioner went into hiding (during which time he continued to work), and (2) that "he was able to borrow a much larger sum to travel to the United States." Similarly, the court found that the petitioner did not establish a well-founded fear of future persecution on account of a protected ground. The court did not consider remand for further fact-finding to be necessary where the petitioner had the opportunity to request a remand with the Board subsequent to the issuance of *Matter of J-S-*.

Garcia v. Holder, No. 12-73781, 2014 WL 1465699 (9th Cir. Apr. 16, 2014): The Ninth Circuit denied the petition challenging an Immigration Judge's denial of asylum from the Dominican Republic. The court found that the Immigration Judge's adverse credibility finding was supported by substantial evidence. The Immigration Judge relied on the fact that when the petitioner was apprehended in each of her four attempts to enter the country, she provided a false name and nationality and did likewise at a criminal hearing before a U.S. District Court judge (where she was convicted of illegal reentry). The Immigration Judge found further support for his credibility finding in the petitioner's equivocation at her removal hearing regarding what she had been asked by the border patrol officials who questioned her following her attempted entries. The court was unpersuaded by the petitioner's argument that she was not provided an opportunity to explain her inconsistencies. The court pointed to the Immigration Judge's questioning of the petitioner to allow her to clarify or explain her inconsistent statements, which satisfied the court's holding in *Soto-Olarte v. Holder*, 555 F.3d 1089, 1092 (9th Cir. 2009). The court also upheld the Board's determination that the petitioner did not warrant protection under the Convention Against Torture. The court noted that its decision in *Kamalthas v. INS*, 251 F.3d 1279, 1282-83 (9th Cir. 2001), requires a separate analysis than the one conducted for asylum and withholding of removal. While it requires that the petitioner be provided the opportunity to present additional evidence, which must be considered by the Immigration Judge and Board, case law does not require the Board to discuss each document submitted. The court held that general language that the Board considered all evidence is sufficient, "[u]nless clear indications exist that the IJ or BIA did not consider the documentary evidence."

Ceron v. Holder, 747 F.3d 773 (9th Cir. 2014) (en banc): The Ninth Circuit granted the petition for review of a decision of the Board finding that the petitioner's conviction for assault with a deadly weapon under section 245(a)(1) of the California Penal Code was categorically for a crime involving moral turpitude. The court first found that even though it is a "wobbler" offense, which could be treated as either a felony or a misdemeanor, the assault is a "crime for which a sentence of one year or longer may be imposed" because, even as a misdemeanor, a maximum penalty of a year of incarceration could be imposed. In reaching this conclusion, the court overruled two earlier decisions, *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 846 (9th Cir. 2003), and *Ferreira v. Ashcroft*, 382 F.3d

1045, 1051 (9th Cir. 2004), as to their misunderstanding of California law regarding the maximum penalty that may be imposed for State misdemeanor convictions. Turning to the issue of moral turpitude, the court stated that its reasoning in *Gonzales v. Barber*, 207 F.2d 398 (9th Cir. 1953), and that of the Attorney General in *Matter of G-R-*, 2 I&N Dec. 733 (BIA 1946, A.G. 1947), holding that a violation of section 245 involves moral turpitude, were no longer valid on account of developments in State and Federal law since the time of their issuance. As an example of these developments, the court found its decision in *Barber* to be at odds with *Taylor v. United States*, 495 U.S. 575 (1990), in which the Supreme Court laid out the categorical approach. The court continued that regarding State law, "California courts only recently defined with precision the requisite mental state for assault." The court therefore remanded the record to the Board for a new categorical determination. There was a dissenting opinion.

BIA PRECEDENT DECISIONS

In three companion cases, *Matter of Aceijas-Quiroz*, 26 I&N Dec. 294 (BIA 2014), *Matter of Introcaso*, 26 I&N Dec. 304 (BIA 2014), and *Matter of Jackson*, 26 I&N Dec. 314 (BIA 2014), the Board considered the application of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 ("Adam Walsh Act"), to the Immigration and Nationality Act. The Adam Walsh Act amended section 204(a)(1) of the Act to provide that a United States citizen or lawful permanent resident who has been convicted of a "specified offense against a minor" is barred from having a family-based visa petition approved unless he or she poses "no risk" to the alien beneficiary. Each of the cases presented a discrete question requiring interpretation of various aspects of the Adam Walsh Act.

In *Matter of Aceijas-Quiroz*, the United States citizen petitioner conceded that he had been convicted of a "specified offense against a minor" but argued that the visa petition he filed on behalf of his alien wife was improperly denied because the Field Office Director required him to prove "beyond a reasonable doubt" that he poses "no risk" to the beneficiary's safety and well-being. First, the Board examined the language and construction of the relevant Adam Walsh Act provision, which, as codified in section 204(a)(1)(A)(viii)(I) of the Act, would bar the petitioner from petitioning for his wife unless the Secretary of Homeland Security, in his "sole and unreviewable discretion," determined that the petitioner poses no risk to his wife.

The Board addressed the argument that the "sole and unreviewable discretion" language was intended only to bar judicial review and that the Board's de novo authority to review all issues in family-based visa petition appeals, including the "no risk" determination, had been preserved. The Board observed that Congress had expressly referred to *court* jurisdiction in other Act provisions when it intended to limit judicial review, using language that is not present in section 204(a)(1)(A)(viii)(I) of the Act. Further, the Board pointed to other provisions of the Act where Congress had used the "sole and unreviewable discretion" language for the purpose of delineating which Federal agency has ultimate responsibility for a determination that potentially implicates the roles of several agencies.

The Board concluded that Congress intended that the discretionary "no risk" determination, including the concomitant legal issue of the appropriate standard of proof to be applied, should be exclusively within the purview of the Secretary of Homeland Security. Consequently, the Board determined that it lacked jurisdiction to review the Field Office Director's decision that the petitioner was statutorily barred from having the visa petition approved because he failed to prove beyond a reasonable doubt that he posed no risk to the beneficiary. The appeal was dismissed. A dissenting opinion asserted that the Board retained the authority to decide the proper evidentiary standard to be applied and to review whether the Director fully evaluated the evidence and clearly set forth the basis for denial of the visa petition.

In *Matter of Introcaso*, the petitioner argued that the categorical approach should be applied to determine whether his conviction is for "a specified offense against a minor." Guided by *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Board observed that certain provisions of the Adam Walsh Act contain circumstance-specific language that invites inquiry into the facts or conduct underlying a conviction. In particular, the Board noted that the first five offenses listed under the Adam Walsh Act's definition of a "specified offense against a minor" are not generally limited to offenses against minors, so the record of conviction or reliable evidence outside of the record must be consulted to determine whether the offense involved a minor. The Board also noted that the last two listed

offenses involve sexual "conduct" relating to a minor, so those provisions also require a circumstance-specific inquiry into the defendant's conduct, as well as the age of the victim.

The Board agreed with the Ninth Circuit's reasoning in *United States v. Mi Kyung Byun*, 539 F.3d 982 (9th Cir. 2008), that the legislative history, purpose, and structure of the Adam Walsh Act supports an inquiry into the facts of a conviction in order to ascertain the age of the victim. The court emphasized that the statute's inclusion of the word "conduct" suggested that an inquiry must necessarily be made into the underlying sexual conduct, not the statutory elements of the offense. Consequently, the Board concluded that a circumstance-specific inquiry into a petitioner's conduct and the age of the victim, rather than the application of the categorical approach, was appropriate in determining whether an offense fell within the ambit of the Adam Walsh Act.

Looking to the conviction documents in the record, the Board determined that the petitioner was convicted of engaging in sexual "conduct" with a child who was under the age of 16 at the time of the offense and that the petitioner was at least 4 years older than his victim. The Board therefore found that the petitioner had been convicted of a crime that qualified as a "specified offense against a minor" under the Adam Walsh Act. Noting its conclusion in *Matter of Aceijas-Quiroz* that it lacked jurisdiction to review the Field Office Director's "no risk" determination, the Board dismissed the appeal.

In *Matter of Jackson*, the question presented was whether applying the Adam Walsh Act to a conviction for a "specified offense against a minor" that predated its enactment was an impermissible retroactive application of the statute. The Board noted that the Adam Walsh Act had no explicit effective date and deemed it to be effective upon its enactment on July 27, 2006, after the petitioner's 1979 conviction for sexual abuse of a minor. Recognizing that Congress did not specify whether the Adam Walsh Act should be applied to offenses or convictions that predate its enactment, the Board pointed to the Supreme Court's determination in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012), that a statute addressing dangers that arise after its enactment does not operate retroactively. The Board concluded that a petitioner who has been convicted of a "specified offense against a minor" poses a present danger to the beneficiary as a potential sexual predator. It therefore held that applying the provisions of the Adam Walsh Act to convictions occurring before its enactment does not have an impermissible retroactive effect.

REGULATORY UPDATE

79 Fed. Reg. 19,958 (Apr. 10, 2014)

DEPARTMENT OF STATE

[Public Notice 8688]

In the Matter of the Designation of Ansar Bayt al-Maqdis, Also Known as Ansar Jerusalem, Also Known as Supporters of Jerusalem, Also Known as Ansar Bayt al-Maqdes, Also Known as Ansar Beit al-Maqdis, Also Known as Jamaat Ansar Beit al-Maqdis, Also Known as Jamaat Ansar Beit al-Maqdis fi Sinaa, Also Known as Supporters of the Holy Place as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter "INA") (8 U.S.C. 1189), exist with respect to as Ansar Bayt al-Maqdis, also known as Ansar Jerusalem, also known as Supporters of Jerusalem, also known as Ansar Bayt al-Maqdes, also known as Ansar Beit al-Maqdis, also known as Jamaat Ansar Beit al-Maqdis, also known as Jamaat Ansar Beit al-Maqdis fi Sinaa.

Therefore, I hereby designate the aforementioned organization and its aliases as a foreign terrorist organization pursuant to section 219 of the INA.

This determination shall be published in the **Federal Register**.

Dated: March 28, 2014.

John F. Kerry,
Secretary of State, Department of State.

79 Fed. Reg. 19,958 (Apr. 10, 2014)
DEPARTMENT OF STATE

[Public Notice 8689]

In the Matter of the Designation of Ansar Bayt al-Maqdis, Also Known as Ansar Jerusalem, Also Known as Supporters of Jerusalem, Also Known as Ansar Bayt al-Maqdes, Also Known as Ansar Beit al-Maqdis, Also Known as Jamaat Ansar Beit al-Maqdis, Also Known as Jamaat Ansar Beit al-Maqdis fi Sinaa, Also Known as Supporters of the Holy Place, as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the organization known as Ansar Bayt al-Maqdis, also known as Ansar Jerusalem, also known as Supporters of Jerusalem, also known as Ansar Bayt al-Maqdes, also known as Ansar Beit al-Maqdis, also known as Jamaat Ansar Beit al-Maqdis, also known as Jamaat Ansar Beit al-Maqdis fi Sinaa, also known as Supporters of the holy place, committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: March 28, 2014.
John F. Kerry
Secretary of State, Department of State.

79 Fed. Reg. 31,143 (May 30, 2014)
Executive Office for Immigration Review

[Docket No. EOIR 182]
Office of the Chief Administrative Hearing Officer Electronic Filing Pilot Program
AGENCY: Office of the Chief Administrative Hearing Officer, Executive Office for Immigration Review, Department of Justice.
ACTION: Public notice.

SUMMARY: The Office of the Chief Administrative Hearing Officer (OCAHO), Executive Office for Immigration Review (EOIR), is creating a voluntary pilot program to test an electronic filing system in certain cases filed with OCAHO under 8 U.S.C. 1324a and 1324b. This notice describes the procedures for participation in the pilot program.
DATES: The pilot program will be in effect from May 30, 2014 until November 26, 2014. Parties who enroll in the pilot program with respect to a particular case within these dates will be permitted to continue utilizing electronic filing throughout the pendency of that case.

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more than whether an alien had traveled abroad after committing an offense giving rise to inadmissibility. 132 S. Ct. at 480 (citing *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976)).

In contrast to the Attorney General's interpretation of former section 212(c), section 212(h) of the Act itself distinguishes between LPRs seeking admission to the United States and those who have already been admitted. Specifically, absent an application for adjustment of status, the *language* of section 212(h) only makes a waiver available to the former class of aliens, not the latter. Based on this language and the Supreme Court's holding in *Judulang*, the Board held that section 212(h) permissibly distinguishes between these classes of aliens and does not raise equal protection concerns because the distinction it creates is not the result of an administrative policy, as was the case in *Matter of L-*, 1 I&N Dec. 1. Instead, the distinction is "inherent in the statutory scheme created by *Congress*." *Matter of Rivas*, 26 I&N Dec. at 133-34 (emphasis added) (quoting *Matter of Gonzalez-Camarillo*, 21 I&N Dec. 937, 942 (BIA 1997)). Additionally, the Board found that after the amendments to section 212(h),

eligibility for a waiver does not depend on international travel; rather it turns on whether the application for a waiver is made while the alien is seeking admission or when the DHS is seeking to remove the alien.

The Board's decision in *Matter of Rivas* establishes that LPRs can only apply for a waiver under section 212(h) of the Act when they are "seeking an admission into the United States" within the meaning of section 101(a)(13)(C) of the Act or in conjunction with an application for adjustment of status. *See* 8 C.F.R. § 1245.1(f) (providing that an application for adjustment of status under section 245 of the Act is the sole method for requesting a section 212(h) waiver as it relates to the inadmissibility of an alien "in the United States"). Therefore, a "stand alone" 212(h) waiver is no longer available nunc pro tunc to an LPR who was readmitted to the United States after the commission of an offense giving rise to inadmissibility.

Availability of a Section 212(h) Waiver in Other Situations

Before *Matter of Rivas*, the Board issued a number of precedent decisions addressing the availability of section 212(h) waivers in other contexts. In *Matter of Abosi*, 24 I&N Dec. 204, the Board acknowledged that 8 C.F.R. § 1245.1(f) does not prevent LPRs who are "seeking an admission" and are charged with a criminal ground of inadmissibility from applying for a section 212(h) waiver without simultaneously filing an application for adjustment of status. The Board held that the regulation applies only to aliens *in the United States* who are seeking to overcome a ground of inadmissibility. The respondent in *Matter of Abosi* was seeking admission into the United States and already had LPR status. Thus, he was not bound by 8 C.F.R. § 1245.1(f) because he was not considered to be "in the United States." The Board held that returning LPRs who are treated as seeking an admission under section 101(a)(13)(C) of the Act and are attempting to overcome a ground of inadmissibility in removal proceedings can apply for a waiver under section 212(h) of the Act without concurrently filing an application for adjustment of status.

In *Matter of Bustamante*, 25 I&N Dec. 564, the Board held that an applicant for cancellation of removal cannot use a section 212(h) waiver to overcome a mandatory bar to relief under section 240A(b)(1)(C) of the Act based on a conviction for an offense specified in section 212(a)(2), or 237(a)(2) or (3). The Board found that this was the case even when the conviction was for an offense that triggered a ground of inadmissibility that could be waived under section 212(h). The Board reasoned that the language of section 212(h) specifically waives the application of "grounds" of inadmissibility and not the underlying conduct that would trigger that ground. Furthermore, the cancellation of removal statute bars a grant of relief where an individual has been convicted of crimes *referenced* in certain inadmissibility provisions, but that bar is not contingent on the applicability of the ground of removability. The fact of conviction is sufficient. Because section 212(h) waives only the ground of inadmissibility and not the fact of conviction, the Board concluded that the waiver is inapplicable to cancellation of removal.

In *Bustamante*, the Board contrasted the language in section 240A(b)(1)(C) of the Act, which bars anyone "convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) of the Act" from a grant of cancellation of removal, with the bar to special rule cancellation for certain battered spouses and children, which refers to aliens who are "inadmissible or deportable" under certain *grounds* listed in section 240A(b)(2)(A)(iv) of the Act. While the Board noted this disparate language, which could suggest that an applicant for special rule cancellation of removal could waive his or her *inadmissibility* with a section 212(h) waiver, the Board did not address this issue in *Matter of Bustamante*. *See also Matter of Y-N-P-*, 26 I&N Dec. at 17 & n.7 (citing *Matter of Bustamante*, 25 I&N Dec. at 568 & n.2). Instead, the Board addressed this issue a year later in *Matter of Y-N-P-*, 26 I&N Dec. 10.

In *Matter of Y-N-P-,* the Board looked to the language of the Act and examined the authority of the Attorney General and the instances in which Congress has provided for the availability of section 212(h) waivers. First, the Board reasoned that section 212(h) grants the Attorney General the discretion to waive a ground of inadmissibility but does not grant the authority to cancel removal. Section 240A of the Act does grant the Attorney General that authority, but when an alien has committed or been convicted of certain offenses, the authority is limited. Although the special rule cancellation provision refers to aliens who are "inadmissible" on account of certain criminal grounds that are waivable under section 212(h), the Board concluded that nothing in section

212(h) "grants the Attorney General authority to consent to cancellation of the removal of an alien who is present in the United States and does not otherwise satisfy the basic eligibility requirements for that relief." *Matter of Y-N-P-*, 26 I&N Dec. at 14.

Second, the Board noted that section 212(h) of the Act specifically provides for a waiver where "the Attorney General 'has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.'" *Id.* at 12 (emphasis omitted) (quoting section 212(h)(2) of the Act). The Board observed that the respondent did not fit into any of these categories because she was not applying for either admission or adjustment of status. Although the Board recognized that section 240A(b) of the Act is entitled "Cancellation of Removal *and Adjustment of Status* for Certain Nonpermanent Residents," it found that an application for cancellation of removal and adjustment of status does not involve a separate application for admission or adjustment. *Id.* at 14-15 (emphasis added). Instead, the Board found that the adjustment of status of an alien who is granted cancellation of removal occurs as a matter of course. "Such an alien is not required to file an application for adjustment of status, establish his or her admissibility (as is required to adjust status under section 245(a) of the Act), or otherwise satisfy any eligibility criteria beyond those included in section 240A(b)(2)." *Id.* at 15 (citing *Matter of Bustamante*, 25 I&N Dec. at 569). "Rather, lawful permanent resident status is granted solely as a consequence of the cancellation of removal." *Id.* (footnote omitted). The Board further observed that 8 C.F.R. § 1245.1(f) requires an applicant in the United States to apply for a section 212(h) waiver concurrently with an application for adjustment of status under section 245 of the Act or one of the other provisions included in that regulation. Notably, section 240A(b) is not listed under 8 C.F.R. § 1245.1(f).

Based on this analysis, the Board concluded that neither the statute nor the regulations allow for the use of a section 212(h) waiver in conjunction with an application for cancellation of removal. Thus, the Board held that an applicant for special rule cancellation of removal cannot apply for a section 212(h) waiver to overcome criminal offenses that render the applicant ineligible for that form of relief.

Conclusion

The Board has clarified the circumstances in which aliens in removal proceedings can apply for waivers under section 212(h) of the Act. *Matter of Rivas* was decided a year after *Matter of Y-N-P-* and built off its reasoning, as well as that provided in *Matter of Abosi* and *Matter of Bustamante*. The common thread throughout these decisions is that the Attorney General, and thus the Board and Immigration Courts, are bound by the plain language of the statute. Therefore, section 212(h) waivers are only available in certain well-defined circumstances, and because the language of the statute explicitly provides the instances in which waivers are available—when applying or reapplying for a visa, admission, or adjustment of status—the Attorney General is without the authority to expand its availability. In the case of LPRs, such waivers are only available in removal proceedings to those who are treated as seeking an admission under section 101(a)(13)(C) of the Act or to applicants for adjustment of status under section 245. Thus, section 212(h) relief is expressly unavailable to applicants for cancellation of removal and to LPRs charged with removability under section 237(a) who have not filed for the waiver in conjunction with an application for adjustment of status, regardless of any prior foreign travel.

Which LPRs Are Subject to the Aggravated Felony Bar and Presence Requirement of Section 212(h) of the Act?

While the Board's recent decisions have firmly established that the IMMACT 90 amendments to section 212(h) of the Act limit the availability of a waiver under this provision, the Board and circuit courts diverge on their interpretations of the exclusionary provision added by the IIRIRA. As noted, this provision limits the availability of a section 212(h) waiver by making such waivers unavailable to aliens who have "previously been admitted to the United States as an alien lawfully admitted for permanent residence" if either (1) since "the date of such admission" the alien has been convicted of an aggravated felony, or (2) the alien has not lawfully resided continuously in the United States for not less than 7 years immediately preceding the date of initiation of removal proceedings. Section 212(h) of the Act. Adjudicators interpreting this exclusionary provision have encountered two questions. First, does the exclusionary provision apply

to an individual who was admitted as an LPR unlawfully? Second, does the phrase "admitted to the United States as an alien lawfully admitted for permanent residence" mean that the aggravated felony bar and the residence requirement apply only to those who were admitted as LPRs at a port of entry and not to those who adjusted to LPR status post-entry? While the first question has been conclusively answered, the second remains a contested issue, which has given rise to a circuit split and a split between six circuits and the Board.

Unlawful Admission as an LPR

In *Matter of Ayala*, 22 I&N Dec. 398, 399 (BIA 1998), the Board considered whether the aggravated felony bar and the residence requirement of section 212(h) of the Act applied to an alien convicted of conspiracy to defraud the United States by making false statements to a Department of the United States Government in violation of 18 U.S.C. § 371. Ayala's conviction related to his activities as the vice president of a firm that prepared fraudulent asylum applications to obtain employment authorization for the firm's "clients." Ayala had not accrued 7 years of residence between his 1991 admission and the initiation of deportation proceedings in 1996 and so would not be eligible for a section 212(h) waiver if the exclusionary provision applied to him. Ayala argued that the residence requirement did not apply to him because his admission was not lawful—that is, he was inadmissible at the time of entry because the conspiracy began prior to his 1991 admission as an LPR.

The Board disagreed, finding that the phrase "previously been admitted" under section 212(h) distinguished between aliens previously admitted for permanent residence and those who have not been admitted. However, section 212(h) did not distinguish between aliens whose admissions were lawful and those whose admissions were not. The Board determined that the *fact* of the respondent's previous admission as an LPR was sufficient to trigger the residence requirement under section 212(h) of the Act because there was no requirement in the statute that the previous admission be substantively lawful. This is distinct from the requirement for LPR cancellation of removal that an applicant have "been an alien *lawfully* admitted for permanent residence for not less than 5 years." Section 240A(a)(1) of the Act (emphasis added). The Board has held that the language in the cancellation of removal statute requires that an alien obtain permanent resident status in a substantively lawful manner. *Matter of Koloamatangi*, 23 I&N Dec. 548, 552 (BIA 2003).

The difference in language is evident. Section 212(h) requires that an LPR must have been "previously . . . admitted," while section 240A(a)(1) requires that an LPR must have been "*lawfully* admitted." (Emphasis added.) An individual can be "admitted as" an LPR without that admission being substantively lawful. *See Matter of Areguillin*, 17 I&N Dec. 308, 309-11 (BIA 1980) (requiring procedural regularity, rather than substantive lawfulness, for an individual to effect an "admission" for purposes of adjustment of status); *see also Matter of Quilantan*, 25 I&N Dec. 285, 292-93 (BIA 2010) (reaffirming *Matter of Areguillin* notwithstanding the enactment of section 101(a)(13)(A) of the Act). The Board concluded that because the admission as an LPR need not be substantively lawful to trigger the exclusionary provision, Ayala was subject to the provision. Because he could not establish that he had the requisite 7 years of continuous residence, he was ineligible for a section 212(h) waiver.[4]

The circuit courts that have considered this issue have followed the Board's decision in *Matter of Ayala*, 22 I&N Dec. 398. *See Martinez v. Att'y Gen. of U.S.*, 693 F.3d 408, 415 (3d Cir. 2012) (applying the aggravated felony bar under section 212(h) of the Act to an LPR present pursuant to a fraudulent admission); *Hing Sum v. Holder*, 602 F.3d 1092, 1096 (9th Cir. 2010) (same); *Onwuamaegbu v. Gonzales*, 470 F.3d 405, 409 (1st Cir. 2006) (finding that the 7-year residence requirement applied to an LPR who obtained admission through fraud). Accordingly, it is well settled that the residence requirement and the aggravated felony bar under section 212(h) apply to an LPR present in the United States pursuant to a prior admission, irrespective of whether that admission was substantively lawful.

LPRs Through Adjustment of Status

While the previous issues may be settled, there remains an area of uncertainty and disagreement regarding the application of section 212(h) of the Act. The language of the exclusionary provision of section 212(h) regarding to whom the aggravated felony bar and the 7-year residence requirement apply has caused a split between several circuit courts and the Board and between

the circuit courts themselves. The Board has found the term "admitted" in section 212(h) to be ambiguous and interprets that phrase broadly, an approach to which the Eighth Circuit has accorded deference. Six other circuit courts have found the term "admitted" in section 212(h) to be unambiguous and have declined to defer to the Board's interpretation. These six circuit courts have applied the definition of "admission" in section 101(a)(13)(A) of the Act strictly and, in effect, have interpreted the term "admission" narrowly. As a result of this split, whether an LPR is eligible to apply for a waiver under section 212(h) may depend on the circuit in which the case arises.

The aggravated felony bar and 7-year residence requirement in section 212(h) apply to aliens who have been "admitted to the United States as an alien lawfully admitted for permanent residence." This phrase contains two terms expressly defined in the Act. Section 101(a)(13)(A) defines "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Section 101(a)(20) defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." When these definitions are substituted for their corresponding phrases, the exclusionary provision of section 212(h) applies to aliens who have previously lawfully entered "into the United States after inspection and authorization by an immigration officer" as an alien "lawfully accorded the privilege of residing permanently in the United States." Sections 101(a)(13)(A), (20) of the Act.

By referring only to those aliens who have been "admitted" as LPRs, section 212(h), on its face, does not apply to aliens who adjusted to LPR status while in the United States, because an adjustment of status does not require an entry after inspection and authorization pursuant to section 101(a)(13)(A) of the Act.[5] However, since the IIRIRA replaced the term "entry" in the Act with the terms "admitted" and "admission," the Board has determined in several instances that these terms are ambiguous. For example, the Board has found that the terms "admitted" and "admission" are ambiguous with regard to aliens who have adjusted to LPR status in the United States after entering the country without inspection and authorization by an immigration officer.

The Board first considered whether adjustment of status constituted an "admission" as defined in section 101(a)(13)(A) of the Act in *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999) (en banc). Rosas entered the United States without inspection and then adjusted to LPR status. She was later convicted of a controlled substance offense. Based on that conviction, the Immigration and Naturalization Service—the predecessor to the DHS—instituted removal proceedings and charged Rosas with being subject to removal under section 237(a)(2)(A)(iii) of the Act, which provides that "[a]ny alien who is convicted of an aggravated felony at any time *after admission* is deportable." Section 237(a)(2)(A)(iii) of the Act) (emphasis added). The question before the Board was whether Rosas' adjustment of status constituted an "admission" within the meaning of section 237(a)(2)(A)(iii), despite the fact that she had not been inspected and admitted at a port of entry as described in section 101(a)(13)(A). If Rosas' adjustment of status was not an "admission," then Rosas would avoid deportation because she would not have been convicted of an aggravated felony "after admission." The Board determined that "aliens 'lawfully admitted for permanent residence' through the adjustment process are considered to have accomplished an 'admission' to the United States" for purposes of determining their removability under section 237(a)(2)(A)(iii) of the Act. *Rosas*, 22 I&N Dec. at 619.

Nine years later, in *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008), the United States Court of Appeals for the Fifth Circuit reversed the Board's finding that Martinez, an alien who was admitted to the United States as a nonimmigrant and later adjusted to LPR status, was ineligible for a waiver under section 212(h) because he was convicted of an aggravated felony. The Board had applied the exclusionary provision of section 212(h) to Martinez, finding that *Matter of Rosas* was controlling. In doing so, the Board determined that the term "admitted" in section 212(h) was ambiguous and included adjustment of status within the United States. The Fifth Circuit considered the definitions of "admitted" and "lawfully admitted for permanent residence" under sections 101(a)(13)(A) and (20) of the Act and concluded that for the aggravated felony bar under section 212(h) to apply "when the alien is granted permission, after inspection, to enter the United States, he must then be admitted as an LPR." *Id.* at 544. The court therefore found the language "admitted . . . as an alien lawfully admitted for permanent residence" to

be unambiguous and held that under the plain language of section 212(h), the aggravated felony bar and 7-year residence requirement apply to aliens who were admitted at a port of entry *as LPRs* and not to aliens who adjusted to LPR status post-entry. Because the statutory language was unambiguous, the court found that it need not defer to the Board's interpretation of "admission."

In response to the Government's argument that excluding an adjustment of status from the definition of "admission" would cause absurd results, the Fifth Circuit found that Congress could have had a rational basis for distinguishing between those who are admitted as LPRs and those who adjust to that status. The court specifically noted that Congress could have been taking a first step in an incremental approach to achieving the goal of removing criminal aliens by starting with aliens admitted as LPRs. As additional support for its decision, the court noted that Congress considered a bill that would have amended the definition of "admission" and "admitted" to include adjustment of status, but the bill did not pass. *Id.* The court stated that the failure of this amendment was "perhaps out of recognition that limited enforcement resources should be devoted to attacking the problem in stages." *Id.* at 545.

In *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), the Board applied the same reasoning it had adopted in *Matter of Rosas* to interpret the term "admission" under section 212(h) of the Act. Koljenovic, unlike the alien in *Martinez*, entered the United States without inspection and subsequently adjusted to LPR status in 2001. The Board held that Koljenovic's 2001 adjustment was an "admission" so he was subject to the residence requirement of section 212(h).

The Board supported its conclusion by looking to the Conference Report accompanying the IIRIRA which states: "The managers intend that the provisions governing continuous residence set forth in INA section 240A . . . shall be applied as well for purposes of waivers under INA section 212(h)." *Id.* at 222 (quoting H.R. Rep. 104-828, at 228 (1996) (Conf. Rep.) (Joint Explanatory Statement)). The continuous residence requirement in section 240A of the Act (necessitating 7 years of continuous residence after admission in any status) applies to both those who are admitted as LPRs at a port of entry and those who adjusted to LPR status. The Board found that an interpretation of section 212(h) that exempted aliens who adjusted to LPR status from the 7-year residence requirement under that section would frustrate this legislative purpose. Under such an interpretation, an alien who is removable for a conviction, who adjusted to LPR status, and who has not resided continuously in the United States for 7 years would be ineligible for cancellation of removal under section 240A but would remain eligible for a section 212(h) waiver. The Board concluded that the legislative history did not support this result and thus an "admission" under section 212(h) must include an adjustment of status.

Finally, the Board emphasized that *not* construing an adjustment of status to be an "admission" under section 212(h) of the Act would lead to absurd results for other aliens who obtained LPR status through adjustment. For instance, aliens who entered without inspection and who later adjusted to LPR status would be ineligible for relief under sections 212(c) and 240A(a) of the Act because both sections require that the applicant be "admitted" for permanent residence. Thus, the Board found its interpretation of section 212(h) of the Act, which treated an adjustment of status as an admission, was the most consistent with the overall structure of the Act regarding the eligibility of aliens for relief.

It is important to note that the alien in the Fifth Circuit's decision in *Martinez*, entered the United States lawfully with a nonimmigrant visa before adjusting to LPR status. Thus, the Fifth Circuit's decision in *Martinez* did not squarely discuss section 212(h)'s applicability to an alien who entered the United States *without inspection* and then later adjusted to LPR status, as was the case in *Matter of Koljenovic*, 25 I&N Dec. 219. As a result, although the Board applied the rule in *Martinez* in all section 212(h) cases akin to *Martinez* arising in the Fifth Circuit, it applied its interpretation of section 212(h) in *Matter of Koljenovic* to Fifth Circuit cases in which the alien had adjusted to LPR status after entering the country without inspection. *See Arellano-Acosta v. Holder*, 478 F. App'x 228, 229 (5th Cir. 2012) (reversing the Board's determination that *Martinez* did not apply in cases where the alien entered without inspection and later adjusted).

After *Matter of Koljenovic*, the Fourth and Eleventh Circuits joined the Fifth Circuit in holding that an alien who is not admitted as an LPR at a port of entry, but who adjusts post-entry instead, has not "previously been admitted to the United States as an alien lawfully admitted

for permanent residence" as the exclusionary provision of section 212(h) requires. *Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012); *Lanier v. Att'y Gen.*, 631 F.3d 1363 (11th Cir. 2011). Both of these decisions mirror the Fifth Circuit's reasoning in *Martinez*. *Bracamontes* dealt with an alien who had been admitted as a temporary resident and later adjusted status. However, unlike *Bracamontes* and *Martinez*, the Eleventh Circuit's decision in *Lanier* squarely held that an alien who entered *without inspection* and later adjusted status was eligible for a section 212(h) waiver despite having been convicted of an aggravated felony after her adjustment.

Two years after its decision in *Matter of Koljenovic*, the Board issued a companion decision addressing these circuit court decisions. In *Matter of E.W. Rodriguez*, 25 I&N Dec. 784, 786 (BIA 2012), the Immigration Judge had found that Rodriguez, whose status was adjusted to that of an LPR after entering without inspection, was subject to the exclusionary provision under section 212(h) of the Act and ineligible for a waiver because of an aggravated felony conviction. *Matter of E.W. Rodriguez* arose in the Fifth Circuit, and Rodriguez argued that the Immigration Judge erred in not applying the Fifth Circuit's decision in *Martinez* to his case. Initially, the Board dismissed Rodriguez's appeal, considering his case to be distinguishable from *Martinez* because Rodriguez, unlike Martinez, entered the United States *without inspection* prior to adjusting his status. On a motion to reconsider, the Board reviewed its decision and determined that the Fifth Circuit's decision in *Martinez* was binding precedent in cases arising in that circuit. Likewise, the Board concluded that the Fourth and Eleventh Circuits' decisions were also binding precedent and that it would apply them in removal proceedings arising in those jurisdictions.

Nevertheless, the Board maintained that its decision in *Matter of Koljenovic* was correct and that the language of section "212(h) is ambiguous when understood in the context of the statute taken as a whole." *Id.* at 789. The Board acknowledged that adjustment of status does not fit within the definition of "admission" set forth in section 101(a)(13)(A) of the Act. However, the Board explained that it was constrained to interpret adjustment of status as an admission "in order to preserve the coherence of the statutory scheme and avoid absurdities." *Id.*

Since the Board's decision in *Matter of E.W. Rodriguez*, the Third, Seventh, and Ninth Circuits have adopted the same reasoning as the Fifth Circuit's decision in *Martinez*. *See Negrete-Ramirez v. Holder*, 741 F.3d 1047 (9th Cir. 2014); *Papazoglou v. Holder*, 725 F.3d 790 (7th Cir. 2013); *Hanif v. Att'y Gen. of U.S.*, 694 F.3d 479 (3d Cir. 2012). These circuits find that the language in section 212(h) of the Act is unambiguous and thus the exclusionary provision applies only to aliens who have been admitted into the United States as LPRs at a port of entry.

Although the majority of circuits have not deferred to the Board's reasoning in *Matter of Koljenovic*, the Eighth Circuit recently deferred to the Board's interpretation of the term "admission" in section 212(h) of the Act. *See Roberts v. Holder*, 745 F.3d 928 (8th Cir. 2014). Roberts was admitted to the United States as a nonimmigrant and later adjusted to LPR status. He was convicted of an aggravated felony and placed in removal proceedings, where he sought to readjust his status under section 245(a) of the Act and apply for a waiver of inadmissibility under section 212(h). The Immigration Judge found Roberts subject to the aggravated felony bar, and the Board affirmed. The Eighth Circuit broke with the reasoning of the majority of its sister circuits and held that based on the Act as a whole, not only on sections 212(h) and 101(a)(3), the language of section 212(h) "is ambiguous as to the meaning of 'previously been admitted as an alien lawfully admitted to permanent residence.'" *Id.* at 932.

Specifically, the Eighth Circuit noted that the Act uses the terms "admission" and "admitted" inconsistently. Although the definition of "admission" and "admitted" in section 101(a)(13)(A) of the Act refers explicitly to inspection at a port of entry, "in other sections relevant to Robert's petition, 'admitted' is not so limited." *Id.* The court then surveyed several provisions relating to admissibility and inadmissibility as well as adjustment of status. The circuit court found it particularly notable that under section 245(b) of the Act, after an alien has adjusted to LPR status under section 245(a), "the Attorney General shall record the alien's lawful *admission* for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made" and that the number of visas shall be reduced accordingly. *Id.* at 933 (emphasis added) (quoting section 245(b) of the Act). The Government argued that section 245(b) established that an adjustment *was an admission*

for all intents and purposes under the Act. The Third Circuit previously dismissed this argument in *Hanif*, 694 F.3d at 485, finding that section 245(b) of the Act was "a ministerial provision relating to the monitoring and control of the number of visas available in any given year, rather than an effort by Congress to amend the definition of 'admitted' and 'lawfully admitted for permanent residence' set forth in [section 101(a) of the Act]."

However, the Eighth Circuit in *Roberts* disagreed with the Third Circuit's reasoning and found that the treatment of adjustment as an admission in section 245(b) of the Act demonstrates that when the Act is taken as a whole, the statute "may be fairly read as treating post-entry adjustment as a substitute for port-of-entry inspection" and thus as an "admission." 745 F.3d at 933. The court further held that because the term "admission" under section 212(h) of the Act is susceptible to multiple interpretations, the statute is ambiguous and deference to the Board's reasonable interpretation is required. The court asserted that the circuits that have found the term to be unambiguous have read section 212(h) in isolation and did not consider the Act as a whole.

With the issuance of the Eighth Circuit's decision in *Roberts*, the circuits are now split as to whether deference is owed to the Board's determination that an adjustment is an admission for the purpose of determining whether the aggravated felony bar and 7-year residence requirement apply to LPRs seeking waivers under section 212(h) of the Act. Cases on this issue are currently pending in the Second and Sixth Circuits. *See Sampathkumar v. Holder*, No. 11-4342 (2d Cir. filed Oct. 20, 2011); *Stanovsek v. Holder*, No. 13-3279 (6th Cir. filed Mar. 8, 2013).

Conclusion

The issues created by the 1990 and 1996 amendments to section 212(h) of the Act have mostly been reconciled, and the applicability of the waiver is largely settled. First, *Matter of Rivas*, 26 I&N Dec. at 132-33, established that under the current version of the statute, a section 212(h) waiver is not available nunc pro tunc to LPRs and that LPRs may only apply for the waiver in conjunction with an application for adjustment of status or while seeking admission. *See also Matter of Abosi*, 24 I&N Dec. at 206. Second, a section 212(h) waiver cannot be used to waive criminal bars to cancellation of removal. *Matter of Bustamante*, 25 I&N Dec. at 564; *see also Matter of Y-N-P-*, 26 I&N Dec. at 16. Third, the aggravated felony bar and 7-year residence requirement in section 212(h) of the Act apply to aliens who obtained LPR status through substantively unlawful admissions, as long as their admissions were procedurally lawful. *See, e.g.*, *Matter of Ayala*, 22 I&N Dec. at 401-02.

Although most of the issues are settled, another remains in dispute. There is a circuit split regarding whether deference should be given to the Board's application of the aggravated felony bar and residence requirement to aliens who adjusted to LPR status and were not admitted as an LPR at a port of entry. *Compare Roberts*, 745 F.3d at 933 (finding the statute ambiguous and according deference to the Board's interpretation), *Matter of E.W. Rodriguez*, 25 I&N Dec. at 786 (finding section 212(h) to be ambiguous and applying this interpretation nationwide, except where binding circuit precedent provides otherwise), *and Matter of Koljenovic*, 25 I&N Dec. at 220-23 (finding that that the language of section 212(h) is ambiguous when understood in the context of the Act as a whole), *with Negrete-Ramirez*, 741 F.3d at 1054 (finding statute unambiguous and declining to defer to the Board's interpretation), *Papazoglou*, 725 F.3d at 794 (same), *Hanif*, 694 F.3d at 487-88 (same), *Bracamontes*, 675 F.3d at 390 (same), *Lanier*, 631 F.3d at 1367 (same), *and Martinez*, 519 F.3d at 546 (same). As a result of this circuit split and the split between the Board and six circuit courts, the exclusionary provision of section 212(h) applies only to aliens admitted as LPRs at a port of entry in the Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits. In all other circuits, particularly the Eighth where deference was accorded to the Board, the rule in *Matter of Koljenovic* controls—the exclusionary provision applies with equal force to LPRs admitted to the United States in that status at a port of entry *and* to LPRs who adjusted to LPR status in the United States. Cases dealing with this final issue are pending in the Second and Sixth Circuits.

A resolution of this matter may require action by Congress or the Supreme Court. Not only does this issue present a nuanced question about the definition of a single word in a subsection of one statute, it is a continuation of a long-standing dispute regarding the interpretation of the term "admission" in the Act. It also raises generally applicable questions about agency deference, particularly with regard to how courts determine whether a statute is ambiguous.

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1. The word "alien" is defined in the Act as "any person not a citizen or national of the United States." Section 101(a)(3) of the Act, 8 U.S.C. § 1101(a)(3). This legal term of art will be used throughout this article to avoid ambiguity.

2. In addition to demonstrating hardship and 10 years of continuous physical presence, a non-LPR must demonstrate that he has been a person of good moral character during the 10 years preceding the adjudication of his application and that he has not been convicted of certain crimes, including crimes involving moral turpitude, prostitution, controlled substance violations, and aggravated felonies. Sections 240A(b)(1)(A)-(D) of the Act; *see also Matter of Ortega-Cabrera*, 23 I&N Dec. 793, 797 (BIA 2005). LPR cancellation has no good moral character or hardship requirements, and an aggravated felony is the only disqualifying conviction for such relief. *See* section 240A(a)(3) of the Act.

3. Section 5 of the Act of September 11, 1957, 71 Stat. at 640, was repealed by section 24 of the Act of September 26, 1961, Pub. L. No. 87-301, 75 Stat. 650, 657, but, at the same time, virtually identical waiver provisions were added to the Immigration and Nationality Act as section 212(g). *See* section 14 of the Act of September 26, 1961, 75 Stat. at 655.

4.The Board has since further held that the lawful residence requirement under section 212(h) only includes periods of residence in a lawful status and does not include any period during which the individual was an applicant for asylum or for adjustment of status. *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008).

5. However, the plain text of section 212(h) may apply to an alien who adjusted to LPR status and who later departed from the country and was readmitted at a port of entry after he or she was deemed to be seeking an admission under section 101(a)(13)(C) of the Act.