U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11811906

Date: APR. 29, 2022

Appeal of Denver, Colorado Field Office Decision

Form I-212, Application for Permission to Reapply for Admission

The Applicant seeks permission to reapply for admission to the United States under sections 212(a)(9)(A)(iii) and 212(a)(9)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii) and 1182(a)(9)(C)(ii).

The Director of the Denver, Colorado Field Office approved the Form I-212, Application for Permission to Reapply for Admission, in February 2017. However, in April 2020, the Director revoked the approval of the application, stating that it was approved in error. The Director concluded that the Applicant was inadmissible under section 212(a)(9)(C)(i)(II) of the Act because she was ordered removed from the United States and subsequently reentered the country without being admitted. In addition, the Director determined that pursuant to section 241(a)(5) of the Act, the Applicant was not eligible for any relief or benefit under the Act because her prior removal order had been reinstated. The matter is now before us on appeal.

On appeal, the Applicant asserts that the Director erred in determining that she was barred from relief and revoking the approval of her application for permission to reapply for admission.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter de novo. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will sustain the appeal.

## I. LAW

Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), provides that any noncitizen, other than an "arriving alien" described in section 212(a)(9)(A)(i), who "has been ordered removed . . . or departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible."

Noncitizens found inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act if, prior to the date of the reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

Section 212(a)(9)(C) of the Act provides that any noncitizen who has been unlawfully present in the United States for an aggregate period of more than one year, or has been ordered removed, and who enters or attempts to reenter the United States without being admitted, is inadmissible.

Noncitizens found inadmissible under section 212(a)(9)(C) of the Act may seek permission to reapply for admission under section 212(a)(9)(C)(ii), which provides that inadmissibility shall not apply to a noncitizen seeking admission more than 10 years after the date of last departure from the United States if, prior to the reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

Section 241(a)(5) of the Act permits the Secretary of Homeland Security to reinstate a prior removal order against a noncitizen who illegally reenters the United States after having been removed or having departed voluntarily under an order of removal. An individual is not eligible and may not apply for relief under the Act when it is determined that he or she reentered the United States illegally after having been removed and a prior order of removal is reinstated.

## II. ANALYSIS

The record reflects that the Applicant, a native and citizen of Mexico, attempted to enter the United States without inspection on [redacted] 2000, but she was expeditiously removed after an encounter with border protection officers. The Applicant then reentered the United States without authorization on or about the same day. In October 2002, the Applicant's removal order was reinstated during an interview at the field office, and she was removed from the United States for the second time on [redacted] 2002. The record indicates that the Applicant has remained in Mexico since that time.

In in May 2016, the Applicant filed the Form I-212, seeking permission to reapply for admission, which was approved in February 2017. In 2018, the Applicant appeared for a consular interview based on an approved immigrant visa petition filed by her U.S. citizen spouse. The consular officer found the Applicant inadmissible under section 212(a)(9)(A)(ii)[1] of the Act for having been previously removed twice and under section 212(a)(9)(C)(i)(II) of the Act for attempting to reenter the United States without admission after being ordered removed. The consular officer requested the Director to update the approval of the Form I-212 to reflect both sections of the Act in the electronic systems.

In response, the Director stated that the Applicant's Form I-212 was approved in error and revoked the approval of the application in April 2020. The Director determined that pursuant to section

[1] The Applicant is inadmissible under section 212(a)(9)(A)(ii) until October 2022 for being removed from the United State twice.

241(a)(5) of the Act, the Applicant was not eligible for any relief or benefit under the Act because her prior removal order had been reinstated.

On appeal, the Applicant argues that the approval of her application was revoked in error because she is not barred from relief. She maintains she is eligible for permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act as she has remained outside of the United States for 10 years since the date of her last departure in [redacted] 2002. The Applicant further asserts that she is not subject to reinstatement under section 241(a)(5) of the Act because she has not been in the United States since her last removal in [redacted] 2002.[2]

Section 241(a)(5) of the Act provides that when an order of removal is reinstated, "the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry." Here, the Applicant was last removed from the United States in [redacted] 2002 pursuant to the reinstated order. As the reinstated order was fully executed and the Applicant has remained outside the United States since then, section 241(a)(5) of the Act no longer bars her from seeking relief under the Act.

The Applicant is permanently inadmissible under section 212(a)(9)(C)(i)(II) of the Act for having been removed from the United States twice. A noncitizen who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply for admission unless the noncitizen has been outside the United States for more than 10 years since the date of the noncitizen's last departure from the United States. See Matter of Torres-Garcia, 23 I&N Dec. 866 (BIA 2006); Matter of Briones, 24 I&N Dec. 355 (BIA 2007); and Matter of Diaz and Lopez, 25 I&N Dec. 188 (BIA 2010). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the Applicant's last departure was at least 10 years ago, the Applicant has remained outside the United States, and U.S. Citizenship and Immigration Services has consented to the Applicant's reapplying for admission.

In the present matter, the Applicant last departed the United States in [redacted] 2002. Thus, she has remained outside the United States for at least 10 years since her last departure. As a result, she was eligible to apply for the exception to her inadmissibility under section 212(a)(9)(C)(ii) of the Act as of [redacted] 2012.

ORDER: The appeal is sustained.

[2] The Applicant also asserts that the Director's adverse decision violated her due process rights because it was based on erroneous facts. Constitutional issues are not within the appellate jurisdiction of the AAO; therefore, this assertion will not be addressed in the present decision.