U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19647078

Date: AUG. 24, 2022

Appeal of Long Island, New York Field Office Decision

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

The Director of the Long Island, New York Field Office found the Applicant inadmissible for entering the United States without being admitted after having previously been removed. Immigration and Nationality Act (the Act) section 212(a)(9)(C)(i)(II), 8 U.S.C. § 1182(a)(9)(C)(i)(II). The Director denied the Form 1-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, as a matter of discretion, finding the Applicant ineligible because he had not remained outside the United States for 10 years since his last departure, as required under section 212(a)(9)(C)(ii) of the Act. On appeal, the Applicant asserts that section 212(a)(9)(C)(ii) of the Act does not apply in his case. We review the questions raised in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(A)(i) of the Act states that any noncitizen who has been previously ordered removed as an arriving alien, and who seeks admission again within five years of the date of that removal (or within 20 years in the case of a second or subsequent removal) is inadmissible. Under section 212(a)(9)(A)(iii) of the Act a noncitizen may seek an exception to this ground of inadmissibility, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion.

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.

II. ANALYSIS

In denying the Form I-212, the Director concluded that the Applicant attempted to enter the United States on [redacted] 1998, but he was ordered removed under section 235(b)(1) of the Act the same

date and then subsequently entered the United States without inspection on March 8, 1998. The Director acknowledged the Applicant's contention that he withdrew his application for admission and was not ordered removed, but the Director determined that the record showed he was removed on [redacted] 1998, pursuant to an expedited removal order under section 235(b)(1) of the Act. The Director found the Applicant was thus inadmissible under section 212(a)(9)(C)(i)(II) of the Act and had not remained outside the United States for 10 years since his last departure as required before seeking permission to reapply under section 212(a)(9)(C)(ii).[1]

On appeal, the Applicant argues, through counsel, that he is not inadmissible under section 212(a)(9)(C) of the Act and maintains that he was not ordered removed but withdrew his application for admission on [redacted] 1998.

We agree with the Director that the Applicant is subject to requirements under section 212(a)(9)(C) of the Act. Review of the record shows that on [redacted] 1998, the Applicant attempted to enter the United States with a B1/B2 visitor visa, but it was determined that he had been living in the United States since 1990 without permission. He was issued a Form I-860, Notice and Order of Expedited Removal, and he was removed that same day. The record contains a Form ER-583, Withdrawal of Application for Admission, Visa Refusal, Expedited Removal with Expedited Removal circled, and the form indicates "decision to remove this applicant for admission under 235(b)(1) of the Act" with his departure on a flight to [redacted] Malaysia verified. The record contains a Form I-296, Notice to Alien Ordered Removed/Departure Verification dated [redacted] 1998, and signed by the Applicant, that indicates the Applicant was inadmissible for five years from date of departure as consequence of having been ordered removed under section 235(b)(1) or 240 of the Act and that his departure was verified by an immigration inspector. A Form I-275, Withdrawal of Application for Admission/Consular Notification indicates the Applicant's B1/B2 visa was cancelled, and he was ordered removed under section 235(b)(1) of the Act. Thus, the evidence demonstrates that the Applicant was removed pursuant to an expedited removal order on [redacted] 1998, and he concedes that he then entered the United States without inspection on March 8, 1998.[2]

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 USCIS has consented to the Applicant's

[1] The Director also noted that there was no evidence that the Applicant filed an application for a visa with the U.S. Department of State and had been found inadmissible by a consular officer, or that he is an applicant for adjustment of status in the United States, or that he was requesting conditional permission to reapply for admission prior to departing to apply for an immigrant visa. On appeal, the Applicant states that he is requesting conditional approval under 8 C.F.R. § 212.2(j) before departing from the United States to seek an immigrant visa at a U.S. consulate, as he will be inadmissible upon his departure under section 212(a)(9)(A)(i) of the Act based on his prior removal order.

[2] The Applicant argues that he was not in the United States when the expedited removal order was issued so his first entry was not until March 8, 1998. Under section 212(a)(9)(C)(i)(II) of the Act, a noncitizen who is ordered removed and subsequently enters or attempts to enter the United States without being admitted is permanently inadmissible, and the Applicant's entry without admission in March 1998, [redacted] days after he was denied admission as a B1/B2 visitor visa and ordered removed, renders him inadmissible under section 212(a)(9)(C)(i)(II).

reapplying for admission. The Applicant is in the United States, has not remained outside the United States for 10 years, and he is therefore currently ineligible to apply for the exception to inadmissibility under section 212(a)(9)(C) of the Act.

The Applicant also claims that he is a class member and entitled to benefits under the settlement agreement in *Duran-Gonzalez v. DHS* based on his derivative status on his spouse's approved Form I-140, Immigrant Petition for Alien Worker, that was filed before April 30, 2001. Class membership allows an applicant to apply for adjustment of status and permission to reapply for admission under section 212(a)(9)(C)(ii) despite not having remained outside the United States for 10 years. *See Duran-Gonzalez v. DHS*, Civil Action No. C06-1411-MJP (W.D. Wa. Settlement approved 7/21/2014; Judgment entered 7/20/2014). However, the Applicant does not meet the requirements for class membership, which is limited to individuals who reside within the jurisdiction of the Ninth Circuit and filed a Form I-485, Application to Register Permanent Residence or Adjust Status, and Form I-212 between August 13, 2004, and November 30, 2007. *Id.*

The Applicant further disputes that the statute requires him to be outside the United States before being readmitted or when applying for readmission and argues that courts have held that Form I-212 applicants do not need to spend the 10-year period outside United States. In support, the Applicant cites a United States District Court decision from the Northern District of California.[3] However, this decision is not binding authority, and we further note that the applicant in that case had remained outside the United States for more than 10 years before seeking permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act.

The Applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, is in the United States, and has not remained outside the United States for 10 years since his last departure as required to seek permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act. The application for permission to reapply for admission must therefore remain denied.

ORDER: The appeal is dismissed.

[3] *Doe v Wolf*, 19-cv-03852 DMR ND Cal (June 2020). Unlike in the present case, the plaintiff in *Doe v. Wolf* had departed after becoming inadmissible under section 212(a)(9)(C)(i) of the Act and spent more than 10 years outside the United States before being inspected and paroled into the United States. The court determined that he was thus statutorily eligible to seek permission to reapply under section 212(a)(9)(C)(ii) of the Act and also found that he was not required to be physically outside the country to seek this relief.