U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18141482

Date: DEC. 07, 2022

Motion on Administrative Appeals Office Decision

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

The Applicant is inadmissible for entering the United States without being admitted after his removal. He seeks permission to reapply for admission to the United States under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(ii).

The Director of the San Diego, California Field Office denied the Form I-212, Application for Permission to Reapply for Admission (Form I-212). The Director determined that the Applicant was in the United States and subject to a reinstated order of removal, which made him ineligible for any relief or benefit under section 241(a)(5) of the Act; 8 U.S.C. § 1231(a)(5). Further, the Director concluded that the Applicant did not meet the requirements for obtaining consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act because he had not remained outside the United States for 10 years since the date of his last departure. We dismissed the Petitioner's subsequent appeal and adopted and affirmed the Director's decision. The matter is now before us on a combined motion to reopen and motion to reconsider.

In these proceedings, the applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we conclude that the Applicant is no longer subject to section 241(a)(5) of the Act because his reinstated order of removal has been executed and he was removed from the United States on [redacted] 2022. However, the Applicant has not overcome the remaining ground for dismissal of his appeal. Accordingly, we will dismiss the combined motions.

I. LAW

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceeding at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

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 entered the United States without authorization in 1992. The Applicant was placed in deportation proceedings because of a cocaine possession conviction and his entry to the United States without inspection; he was ordered removed in [redacted] 1996 and departed the United States in [redacted] 1998.[1]

The Applicant subsequently reentered the country without authorization; his 1996 removal order was reinstated, and he was removed from the United States in [redacted] 1998. Shortly thereafter, the Applicant reentered the United States without being admitted. His 1996 removal order was reinstated, and he was removed in [redacted] 1998. In May 2000, the Applicant reentered the United States without being admitted. In December 2017, a Form I-871, Notice of Intent/Decision to Reinstate Prior Order, was issued to the Applicant reflecting he was subject to reinstatement of removal under section 241(a)(5) of the Act. He remained in the United States at the time he filed the Form I- 212 in June 2018.

As noted, the Director denied the Applicant's Form I-212 because he was ineligible to apply for any relief under the Act pursuant to section 241(a)(5), and because he was not statutorily eligible to seek permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act, as he had not remained outside the United States for 10 years since the date of his last departure. We dismissed the Petitioner's appeal based on these same grounds in February 2021.

Our records indicate that the Applicant was removed from the United States in [redacted] 2022, pursuant to the reinstated order of removal issued in 2017. As the reinstated removal order has been fully executed

[1] We note that the Board of Immigration Appeals dismissed the Applicant's appeal of the Immigration Judge's initial decision and denied three subsequent motions to reopen or reconsider. The United States Court of Appeals for the Tenth Circuit denied the Applicant's request for a stay pending review on [redacted] 2018, and dismissed the Applicant's petitions for review in 2019. *See Lopez-Vazquez v. Barr*, No. 18-9522 & 18-9545 (10th Cir. Apr. 22, 2019).

and the Applicant remains outside the United States, section 241(a)(5) of the Act no longer applies to the Applicant. Accordingly, we withdraw that basis for denial and will not further address this issue.

The remaining issues on motion are whether the Applicant: (1) has established that we incorrectly applied the law or USCIS policy in concluding that he is ineligible to apply for relief under section 212(a)(9)(C)(ii) of the Act, and (2) has submitted new facts that would warrant the reopening of the appeal.

In dismissing the appeal, we made the following determination:

> 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 ten years ago, the Applicant has remained outside the United States, and USCIS has consented to the Applicant's reapplying for admission. In the present matter, the Applicant is currently residing in the United States. He has not established that he remained outside the United States for 10 years since his last departure in 1998. He is currently statutorily ineligible to apply for permission to reapply for admission.

On motion, the Applicant contends that both the permanent bar imposed by section 212(a)(9)(C)(i)(II) of the Act and the statute's requirement that individuals subject to this bar remain outside the United States for ten years prior to seeking consent to reapply for admission under section 212(a)(9)(C)(ii) are "irrelevant," where, as here, an individual submits a Form I-212 concurrently with an application for adjustment of status. Further, he objects to our reliance on the Board of Immigrant Appeals cases cited above, and specifically contends that *Matter of Torres-Garcia* contains "fatal flaws that make it unworthy of deference and inapplicable to this case."

The Applicant has not demonstrated that our prior decision was based on an incorrect application of relevant law or USCIS policy. The Applicant does not contest that he is inadmissible under section 212(a)(9)(C) for re-entering without being inspected and admitted following his removal from the United States, and he does not contend that he spent the requisite 10 years outside the United States prior to filing this Form I-212. While the Applicant disagrees with the agency's position on the applicability of 8 C.F.R. §§ 212.2(e) and (i)(2) to cases involving section 212(a)(9)(C) inadmissibility, the Applicant concedes that USCIS does not and has not applied the provisions at 8 C.F.R. §§ 212.2(e) and (i)(2) to Form I-212 applications filed by other (non-VAWA) applicants who have triggered a permanent bar on admissibility under section 212(a)(9)(C)(i)(II) of the Act.[2] Further, the Applicant has not established that the cited BIA cases have been overturned .

[2] We acknowledge that Congress has specified that special consideration should be given where an applicant is a VAWA self-petitioner or U or T nonimmigrant; this consideration is not limited to applications under 212(a)(9)(C)(iii) of the Act but is also accorded to applications for consent to reapply under 212(a)(9)(A)(ii) or (C)(ii). Pub. L. No. 109-162, § 813(b), 119 Stat. 2960 (Jan. 5, 2006), Pub. L. No. 109-271, 120 Stat. 750 (Aug. 12, 2006).

We also note that the instructions to the Form I-212 state that individuals that require an exception to the permanent admissibility imposed by section 212(a)(9)(C) of the Act are not eligible to file the Form I-212 while physically present in the United States, or prior to remaining outside the United States for 10 years.[3] Neither of these requirements can be waived by filing the Form I-212 concurrently with an application for adjustment of status. These instructions are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1) and serve as binding authority in the adjudication of the Form I-212.

The Applicant's remaining claims on motion challenge the underlying basis for his original removal order. He contends that any grounds of inadmissibility resulting from his 1996 removal from the United States are no longer applicable to him. The Applicant's 1996 removal was based, in part, on his 1995 felony conviction for possession of cocaine. In 2014, a Utah state court granted his motion to withdraw his guilty plea and vacate his 1995 conviction based on ineffective assistance of counsel and a jurisdictional defect, and he pleaded guilty to a misdemeanor drug charge that does not carry the same immigration consequences. The Applicant asserts that it would be a "grave injustice" to "give further reach to the hollow deportation based on a constitutionally vacated conviction," and cites to *Matter of Malone*, 11 I&N Dec. 730 (BIA 1966) (finding that a deportation order resulted in a gross miscarriage of justice where the finding of deportability was not in accord with the law as interpreted at that time).[4]

The Applicant has also addressed the underlying removal order in a supplemental brief submitted in March 2022. The Applicant cites to multiple Ninth Circuit cases to support his contention that his vacated cocaine possession conviction nullified his removal order and any inadmissibility stemming therefrom. *See Wiedersperg v. INS*, 896 F.2d 1179, 1182 (9th Cir. 1990) (a deportation order based on a conviction which was subsequently vacated on the merits could not be deemed legally executed); *Vega-Anguiano v. Barr*, 982 F.3d 542 (9th Cir. 2019) (a collateral attack on an original removal order is allowed if "the petitioner can show that he has suffered a 'gross miscarriage of justice ' in the initial deportation proceeding"); *Mendez v. INS*, 563 F.2d 956, 959 (9th Cir. 1977) (an individual is returned to the same status he held prior to deportation where the individual was not legally deportable in the first place).

While we acknowledge the Applicant's arguments, we cannot go behind an order of removal to assess its legal sufficiency. Further, there is no indication that the Applicant has successfully challenged his removal order in courts with jurisdiction over such proceedings. In fact, in November 2021, the United States Court of Appeals for the Ninth Circuit considered the Applicant's claims regarding his vacated conviction and dismissed the Applicant's petition for review of the 2017 reinstatement order, determining that he failed to establish a miscarriage of justice that would permit the court to entertain a collateral attack on the 1996 removal order. *See Lopez v. Garland*, 17 F.4th 1232 (9th Cir. 2021).

Therefore, we will not further address the Applicant's contention that his original removal order should be considered invalidated, and that, as such, he is not inadmissible under 212(a)(9)(C) of the Act.

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[3] *See* Instructions for Form I-212 at https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf.

[4] The Applicant's motion includes evidence that, in January 2020, the U.S. District Court for the District of Arizona vacated his conviction for illegal entry after deportation subsequent to a conviction for a felony after granting his petition for a Writ of Error *Coram Nobis*.

III. CONCLUSION

The Applicant has not demonstrated that our prior decision was based on an incorrect application of law or policy or submitted new facts that would warrant reopening of his appeal or approval of his Form I-212.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.