U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23218120

Date: DEC. 15, 2022

Appeal of Washington, D.C. 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 section 212(a)(9)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(ii), because he is inadmissible for entering, and attempting to enter the United States, without being admitted after having accrued unlawful presence in the United States for an aggregate period of more than one year.

The Director of the Washington, D.C. Field Office denied the application, concluding that the Applicant was not eligible to file the application while within United States.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. The Applicant bears the burden of establishing admissibility to the United States "clearly and beyond doubt." *Matter of Bett*, 26 I&N Dec. 437, 440 (BIA 2014). Regarding the requested inadmissibility exception, he must demonstrate eligibility by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon de novo review, we will dismiss the appeal.

I. LAW

Section 212(a)(9)(C)(i) of the Act provides that a noncitizen who "has been unlawfully present in the United States for an aggregate period of more than one year. . . and who enters or attempts to reenter the United States without being admitted is inadmissible." The accrual of unlawful presence for purpose of inadmissibility determinations under section 212(a)(9)(C)(i) of the Act begins no earlier than the effective date of the amendment enacting this section, which is April 1, 1997.

Pursuant to section 212(a)(9)(C)(ii) of the Act, there is an exception for any "alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's 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 alien's reapplying for admission."

Approval of an application for permission to reapply is discretionary, and any unfavorable factors will be weighed against the favorable factors to determine if approval of the application is warranted as a matter of discretion. *Matter of Lee*, 17 I&N Dec. 275, 278-79 (Reg'l Comm'r 1978). Factors to be considered in determining whether to grant permission to reapply include the basis for the prior deportation; the recency of deportation; length of residence in the United States; the applicant's moral character; the applicant's respect for law and order; evidence of the applicant's reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to the applicant or others; and the need for the applicant's services in the United States. *Matter of Tin*, 14 I&N Dec. 371 (Reg'l Comm'r 1973).

II. ANALYSIS

The Applicant, a native and citizen of Peru, first entered the United States on January 15, 2001 with a valid nonimmigrant visitor visa (B-1/B-2) and an authorized temporary stay until February 14, 2001. He timely departed the United States on February 13, 2001. The Applicant was again admitted to the United States on August 17, 2001 as a nonimmigrant visitor with an authorized stay until February 16, 2002. The Applicant remained in the United States until April 29, 2004. Therefore, the Applicant was unlawfully present in the United States for more than one year, from February 17, 2002 until his voluntary departure on April 29, 2004. These facts are not contested.

The Applicant attests that he next entered the United States without inspection on April 20, 2006 and remained until July 8, 2008. Therefore, the Applicant admits to being unlawfully present after his entry without inspection for more than one year, from April 20, 2006 until his voluntary departure on July 8, 2008.

The Applicant married his spouse, then a lawful permanent resident (LPR) of the United States, in [redacted] Peru in [redacted] 2010. He is the beneficiary of an approved Form I-130, Immigrant Petition for Alien Relative, that his then LPR spouse filed on his behalf. His spouse has since become a naturalized U.S. citizen. He applied for an immigrant visa in 2013 at the U.S. Embassy in Lima, Peru. Following an immigrant visa interview on January 15, 2014, the Consular Officer found the Applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year, and under section 212(a)(9)(C)(i)(I) for re-entering the United States without inspection after having been unlawfully present for more than one year. The U.S. Department of State advised the Applicant that he would need to request permission to reapply for admission to the United States under section 212(a)(9)(C)(ii) after he had remained outside the United States for 10 years, no earlier than July 7, 2018.

On August 24, 2018, the Applicant again attended an immigrant visa interview at the U.S. Embassy in Lima. The Consular Officer determined that the Applicant was no longer inadmissible under section 212(a)(9)(B)(i)(II) of the Act because he remained outside the United States for more than 10 years. However, the Consular Officer concluded that the Applicant remained inadmissible under section 212(a)(9)(C)(i)(I) because he had not filed the Form I-212, Application for Permission to Reapply for Admission, and received approval to waive this inadmissibility.

On December 10, 2019, the Applicant requested humanitarian parole pursuant to section 212(d)(5) of the Act, to enter the United States to be with his U.S. citizen daughter while she underwent a series of

brain surgeries. USCIS approved the request and the Applicant was paroled into the United States on January 31, 2020 with an authorized stay until July 30, 2020. He has not departed the United States since his last entry on January 31, 2020.

The Applicant concurrently applied to USCIS to obtain consent to reapply for admission and excuse his entry without admission after accruing more than one year of unlawful presence, and to adjust his status to that of a lawful permanent resident. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a).

A. Inadmissibility

The Applicant concedes inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. The record establishes his accrual of more than a year of unlawful presence in the United States, from his overstay of his period of lawful admission, from February 17, 2002 until his departure on April 29, 2004. He admitted his entry without inspection on April 20, 2006 and unauthorized stay until July 8, 2008 when he voluntarily departed the United States. Thus, the Applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act and must qualify for the exception under section 212(a)(9)(C)(ii) before gaining admission to the country.

B. The Inadmissibility Exception

The exception applies "to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States." Section 212(a)(9)(C)(ii) of the Act. The Applicant has documented that, since last leaving the country in July 2008, he spent more than 10 years in Peru, from July 2008 until January 2020. Thus, by the time the Applicant returned to the United States, he satisfied this portion of the exception.

The exception, however, also requires that, "prior to the alien's . . . attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission." Section 212 (a)(9)(C)(ii) of the Act. The Director interpreted this portion of the exception to require the Applicant to have filed his Form I-212 application abroad. The Applicant filed his application at the USCIS Washington, D.C. Field Office in Fairfax, Virginia.

On appeal, the Applicant asserts that he is not required to file Form I-212 because the U.S. Department of Homeland Security (DHS) already consented to his readmission when he was paroled into the United States. He further asserts that, even if Form I-212 is required, he is not required to file the application outside the United States. He asserts that, although the statue requires an individual to seek permission to reapply before seeking admission, it does not include a specific requirement that the individual must be physically outside of the United States.

The plain language of the Act supports the Director's interpretation. The exception requires consent "prior to the alien's . . . attempt to be readmitted from a foreign contiguous territory." Section 212(a)(9)(C)(ii) of the Act. An "applicant for admission" includes a noncitizen "who arrives in the United States (. . . at a designated port of arrival . . ."). Section 235(a)(1) of the Act, 8 U.S.C. § 1225(a)(1). Thus, the Applicant applied for admission when he presented himself for inspection at the port-of-entry in January 2020. The exception requires consent "prior to" the admission attempt.

Thus, under the plain language of section 212(a)(9)(C)(ii), the Applicant had to file his Form I-212 application before arriving at the port-of-entry. He therefore had to file it outside the United States.

The instructions to Form I-212, which are incorporated into DHS regulations under 8 C.F.R. § 103.2(a)(1), provide additional support for the Director's interpretation. The instructions state that applicants who are inadmissible under section 212(a)(9)(C) "cannot file an application for consent to reapply for admission while [they] are in the United States." USCIS Form I-212 Instructions 03/21/22, 5, https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf.

The Board of Immigration Appeals (BIA) has held that Congress intended section 212(a)(9)(C) of the Act "to single out recidivist immigration violators and make it more difficult for them to be admitted to the United States after having departed." *Matter of Briones*, 24 I&N Dec. 355 at 358 (BIA 2007) (citations omitted); *see also Matter of Torres-Garcia*, 23 I&N Dec. at 875 (further concluding that the regulations at 8 C.F.R. § 212.2 "cannot reasonably be construed as implementing the provision for consent to reapply for admission at section 212(a)(9)(C)(ii)"). The Director's interpretation of section 212(a)(9)(C)(ii) as requiring foreign filings of Form I-212 applications does not conflict with the congressional intent stated by the BIA. The Applicant's arguments therefore do not persuade us. Contrary to the exception's requirements, USCIS did not consent to his reapplication for admission before his arrival at the port-of-entry, nor did he even file the Form I-212 application by that time.

The Applicant asserts that, by paroling him, DHS consented to his presence in the United States without an admission. He therefore contends that DHS "consented to [his] becoming an applicant for admission."

As the Applicant notes, a grant of parole is "not an admission." 7 *USCIS Policy Manual* B.2(A)(3), https://www.uscis.gov/policymanual. *See also* section 212(d)(5) of the Act. Rather, when a noncitizen is paroled into the United States an immigration officer inspects them and permits them to enter the United States "without determining whether they may be admitted into the United States." *Id.* The inadmissibility exception, however, does not require consent for a noncitizen to enter into or be present in the United States. Rather, the exception requires "consent[] to the alien's reapplying for admission." Section 212(a)(9)(C)(ii) of the Act. By paroling the Applicant, CBP consented to his presence in the United States for humanitarian reasons. *See Ibragimov v. Gonzales*, 476 F.3d 125, 131 (2d Cir. 2007) (describing parole under section 212(d)(5) as permission for "an arriving alien who has come to a port-of-entry without a valid entry document to be temporarily released from detention and to remain in the United States pending review of [her] immigration status"). But, contrary to the plain language of the exception, DHS has yet to consent to his "reapplying for admission" as he requested in his Form I-212 application. Thus, the Applicant's argument is unpersuasive.

The Applicant cites to *Doe v. Wolf*, Case No. 19-cv-03852-DMR (N.D. Cal. Jun. 12, 2020) in arguing that he is not required to file Form I-212 outside the United States. He asserts that admission and physical presence are not synonymous and because the statute requires permission only before admission and not before physical presence his Form I-212 may be filed within the United States. In *Doe v. Wolf*, the court permitted a noncitizen to file Form I-212 from within the United States after he was paroled into the country to request asylum following a determination that he had a credible fear of torture. We are not bound to follow the published decisions of a federal district court even in cases arising within the same circuit or district. Although we may consider the reasoning underlying a

district judge's decision, the decision is not binding on us as a matter of law. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

Contrary to the exception's requirements, the Applicant sought admission to the United States before receiving consent while abroad. Thus, under the plain language of section 212(a)(9)(C)(ii) of the Act and the Form I-212 instructions incorporated into DHS regulations, he does not qualify for the requested inadmissibility exception.

III. CONCLUSION

Despite remaining abroad for more than 10 years since his last departure from the United States, the Applicant does not qualify for consent to reapply for admission.

ORDER: The appeal is dismissed.