U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16259478

DATE: MAR. 25, 2022

Motion on Administrative Appeals 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 she is inadmissible for entering 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 San Diego, California Field Office denied the Form I-212, Application for Permission to Reapply for Admission (application for permission to reapply), concluding that the Applicant had not remained abroad for more than 10 years following her last departure from the United States. In our subsequent decisions, which we incorporate here by reference, we dismissed the Applicant's appeal and two motions to reconsider on the same grounds. The matter is now before us on a third motion to reconsider. Upon review, we will dismiss the motion.

I. LAW

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and establishes eligibility for the benefit sought.

Section 212(a)(9)(C)(i) of the Act provides that an alien 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."

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."

8 C.F.R. § 212.2 allows foreign nationals inadmissible under section 212(a)(9)(A) of the Act who are inside the United States and applying for adjustment of status to be granted retroactive permission to reapply for admission.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Except where a different standard is specified by law, an applicant must prove eligibility for the requested immigration benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

The Applicant has been found inadmissible under section 212(a)(9)(C)(i)(I) of the Act for entering the United States without being admitted after having accrued more than one year of unlawful presence. The issue on motion is whether our prior decision was based on an incorrect application of law or policy, and whether it was incorrect based on the record before us.

On motion, the Applicant repeats the arguments she raised on her appeal and first two motions. She asserts that we erred by limiting the functions of the regulation at 8 C.F.R. § 212.2; by assuming that the only way to avoid permanent inadmissibility under section 212(a)(9)(C)(i) of the Act is through an exception to the bar rather than recharacterizing the triggering unlawful entry as lawful; by applying *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) and *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); by failing to apply the provisions of 8 C.F.R. § 212.2(e) and (i)(2); and by limiting the scope of section 813(b) of the Violence Against Women Act of 2005 to cancellation of removal under section 240A of the Act. The Applicant additionally includes citations to case law in support of her assertion that she is eligible for *nunc pro tunc* approval of her application for permission to reapply.

As we stated in our previous decisions, the Applicant is permanently inadmissible under section 212(a)(9)(C)(I) of the Act, for which the only exception is found in section 212(a)(9)(C)(ii) of the Act. An individual who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply for admission unless the individual has been outside the United States for more than ten years since the date of the individual's last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *see also Matter of Briones*, 24 I&N Dec. 355 (BIA 2007).

Furthermore, in regard to the Applicant's *nunc pro tunc* claim, the Board of Immigration Appeal has determined that "the language, structure, and regulatory history of 8 C.F.R. § 212.2 make clear, the regulation was not promulgated to implement current section 212(a)(9) of the Act" and "the very concept of *retroactive* permission to reapply for admission, i.e., permission requested after unlawful reentry, contradicts the clear language of section 212(a)(9)(C)." *Matter of Torres-Garcia*, at 873-875.

Because the Applicant is in the United States and has not resided outside of the United States for more than 10 years since the date of her last departure, the Applicant is currently statutorily ineligible to obtain permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act.

The Applicant has not established that our prior decision was based on an incorrect application of law or policy. Therefore, she has not met the requirements for a motion to reconsider.

ORDER: The motion to reconsider is dismissed.