U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15739404

Date: MAY 3, 2022

Appeal of St. Louis, Missouri Field Office Decision

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

The Applicant re-entered the United States without admission after remaining "unlawfully present" in the country for more than a year. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(C)(i)(I), 8 U.S.C. § 1182(a)(9)(C)(i)(I). Having most recently returned to the United States more than 10 years after her last departure, she seeks consent to reapply for admission. *See* section 212(a)(9)(C)(ii) of the Act.

The Director of the St. Louis, Missouri Field Office denied the application. The Director concluded that the application's filing in the United States bars the submission's approval.

On appeal, the Applicant argues that she qualifies for the requested consent because, before applying, she remained abroad for more than 10 years and legally re-entered the United States upon her most recent return. Alternatively, she requests *nunc pro tunc* approval of her application, as if she received consent before returning to the country. The Applicant also submits additional evidence of her time outside the United States.

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, she 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 (discussing the standard of proof). Upon *de novo* review, we find that her stay abroad of more than 10 years does not cure the application's improper filing in the United States. The domestic filing also renders *nunc pro tunc* approval of the application ineffective. We will therefore dismiss the appeal.[1]

I. LAW

Noncitizens generally cannot gain admission to the United States if they: 1) remained unlawfully present in the country for an aggregate period of at least one year; and 2) re-entered, or attempted to re-enter, the country without being admitted. Section 212(a)(9)(C)(i)(I) of the Act. The term

[1] The Applicant adequately addresses the appellate issues in writing. We therefore deny her request for oral argument. *See* 8 C.F.R. § 103.3(b).

"unlawfully present" means present in the United States after the expiration of a period of authorized stay, or after entry without admission or parole. Section 212(a)(9)(B)(ii) of the Act.

This inadmissibility ground may not apply to noncitizens seeking U.S. admission more than 10 years after their last departures from the country. Section 212(a)(9)(C)(ii) of the Act. They qualify for this exception if, before returning to the United States, U.S. Citizenship and Immigration Services (USCIS) consents to their reapplications for admission. *Id*

II. FACTS

The Applicant, a 45-year-old native and citizen of Mexico, attests that she first came to the United States in 1996. She reportedly entered the country without admission or parole and returned to Mexico in 1999. She states that she again entered the United States without admission or parole in 2004, returning to her home country in May 2007.[2] The Applicant submits evidence that she then remained in Mexico for more than 10 years before seeking admission to the United States in July 2017 at the port-of-entry in [redacted] California.

At the port-of-entry, the Applicant - accompanied by her then 11-year-old son and 6-year-old daughter - told U.S. Customs and Border Protection (CBP) officers that she sought asylum in the United States because she and her children feared violence and organized crime in Mexico. *See* section 208 of the Act, 8 U.S.C. § 1158 (detailing requirements and procedures for asylum applications). She also told the officers that she had a U.S.-citizen daughter in the United States, who was then 20 years old.

The CPB officers placed the Applicant in removal proceedings as an "arriving alien."[3] CBP alleged that she lacked documentation allowing her admission into the United States. *See* section 212(a)(7)(A)(i)(I) of the Act. The officers released her from custody pending her attendance at future, scheduled hearings before an Immigration Judge to determine her admissibility to the country. As of this decision's date, the Applicant's removal proceedings remain pending.

After the Applicant's release from custody, her daughter in the United States filed an immigrant visa petition for her as the "immediate relative" of a U.S. citizen. *See* section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i) (defining the term "immediate relative" to include the parent of a U.S. citizen who is at least 21 years old). The Applicant also concurrently applied to USCIS to adjust her status to that of a lawful permanent resident. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a). To excuse her U.S. entry without admission after accruing more than one year of unlawful presence and ultimately adjust her status, the Applicant seeks consent to reapply for admission.[4]

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[2] USCIS records indicate that the Applicant entered the United States after 2004. Twice in [redacted] 2005, U.S. immigration officers apprehended her along the U.S.-Mexico border and each time allowed her to voluntarily return to Mexico. It is unclear whether the Applicant mistakenly remembers the year of her second U.S. entry as 2004, or whether she entered the country both in 2004 and in 2005.

[3] The term "arriving alien" includes "an applicant for admission coming or attempting to come into the United States at a port-of-entry." 8 C.F.R. § 1.2.

[4] The Applicant also filed a Form I-601, Application to Waive Inadmissibility Grounds, with USCIS. In the waiver application, the Applicant states that she helped another son unlawfully enter the United States in 2004, rendering her inadmissible as an "alien smuggler." *See* section 212(a)(6)(E)(i) of the Act. The pending, waiver application is not before us for consideration.

III. ANALYSIS

A. Inadmissibility

The Applicant concedes inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Her statements establish her accrual of more than a year of unlawful presence in the United States, from the provision's effective date of April 1, 1997, to an unspecified date in 1999 when she voluntarily left the country. She admitted that she later re-entered the United States without admission in 2004 or 2005. 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 May 2007, she spent more than 10 years in Mexico, from May 2007 to July 2017. Thus, by the time the Applicant returned to the United States, she 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 her Form I-212 application abroad. The Applicant filed her application in Missouri.

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 she presented herself for inspection at the port-of-entry in July 2017. 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 her Form I-212 application before arriving at the port-of-entry. She therefore had to file it outside the United States.

The instructions to Form I-212, which are incorporated into Department of Homeland Security (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 06/09/20, 5, https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf.

On appeal, the Applicant distinguishes her case from those of other noncitizens inadmissible under section 212(a)(9)(C)(i) of the Act. *See Matter of Briones*, 24 I&N Dec. 355, 356 (BIA 2007); *Matter of Torres-Garcia*, 23 I&N Dec. 866, 867 (BIA 2006); *Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1160 (10th Cir. 2004). The Form I-212 applications of the noncitizens in those cases were denied after they illegally entered the United States within 10 years of their last departures. *Id.* The Applicant argues

that, unlike the noncitizens in the other cases, she complied with the "intent" of the exception at section 212(a)(9)(C)(ii) of the Act by remaining in Mexico for more than 10 years and then presenting herself for immigration inspection upon her most recent return to the United States.

Contrary to the Applicant's argument, however, 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. at 358 (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 argument therefore does not persuade us.

The Applicant also notes that she is an arriving alien who was paroled into the United States under section 212(d)(5) of the Act. When CBP places arriving aliens in removal proceedings before Immigration Judges and then paroles the noncitizens from custody, section 212(d)(5) of the Act provides the statutory authorization. *See* 8 C.F.R. § 235.3(c) (referencing 8 C.F.R. § 212.5(b), which, under section 212(d)(5) of the Act, allows paroles for "urgent humanitarian reasons or significant public benefit"). As a section 212(d)(5) parolee, she contends that she legally remains outside the United States. *See* section 101(a)(13)(B) of the Act, 8 U.S.C. § 1101(a)(13)(B) (explaining that section 212(d)(5) parolees have not been "admitted" into the country). Thus, she argues that USCIS should consider her Form I-212 application as having been filed abroad.

We recognize that, for due process purposes, parolees under section 212(d)(5) of the Act are legally deemed to be outside the United States. For example, in holding that applicants for admission lack due process rights regarding their applications, the Supreme Court explained that "[w]hen an alien arrives at a port of entry [. . .,] the alien is on U.S. soil, but the alien is not considered to have entered the country for the purposes of this rule." *DHS v. Thuraissigiam*, 140 S.Ct. 1959, 1982 (2020) (citations omitted). We are unaware, however, of the application of that legal fiction for other immigration purposes. For example, a noncitizen whose section 212(d)(5) parole expires, terminates, or is revoked begins accruing "unlawful presence" in the United States under section 212(a)(9)(B) of the Act. Memorandum from Donald Neufeld, USCIS Acting Assoc. Dir.; Lori Scialabba, USCIS Assoc. Dir.; and Pearl Chang, USCIS Acting Chief, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, 28 (May 6, 2009). In 2019, the Applicant submitted her Form I-212 application in Missouri. Thus, for filing purposes, we find that she filed her application in the United States.

Also, even if the Applicant had filed the application abroad, she would not qualify for the requested exception. The provision 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. The Applicant sought admission to the United States when she presented herself for inspection at the port-of-entry in July 2017. *See* section 235(a)(1) of the Act. Contrary to the exception's requirements, USCIS did not consent to her reapplication for admission before her arrival at the port-of-entry, nor did she even file the Form I-212 application by that time.

The Applicant further argues that, by paroling her, CBP "did 'consent to' her entry [into the United States] from a contiguous territory." She therefore contends that she effectively qualifies for the requested inadmissibility exception.

The exception, however, does not require consent to a noncitizen's entry into 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 and her family, CBP consented to their 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 exception's plain language, DHS has yet to consent to her "reapplying for admission" as she requested in her Form I-212 application. Thus, the Applicant's argument is unpersuasive.

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, she does not qualify for the requested inadmissibility exception.

C. Nunc Pro Tunc Approval

The Applicant alternatively requests *nunc pro tunc* approval of her Form I-212 application. *Nunc pro tunc* is a Latin phrase meaning "now for then." The Applicant asks for the application's approval as if the grant occurred before she arrived at the port-of-entry.

Nunc pro tunc approval is a form of administrative relief that neither the Act nor DHS regulations expressly authorize. But USCIS has granted *nunc pro tunc* approvals, including to Form I-212 applicants for admission at ports-of-entry, *see Matter of S-N-*, 6 I&N Dec. 73, 73 (BIA 1954; A.G. 1954), and who have filed accompanying adjustment applications. *See Matter of Ducret*, 15 I&N Dec. 620, 621 (BIA 1976).

As discussed above, the Applicant did not properly file her Form I-212 application. She not only filed it after her arrival at the port-of-entry, but also in the United States. *See* section 212(a)(9)(C)(ii) of the Act. *Nunc pro tunc* approval would cure the timing of her application's filing. But such approval would not remedy the filing's location. The Applicant had to file the application outside the United States. *See* section 212(a)(9)(C)(ii) of the Act. Thus, *nunc pro tunc* approval would be ineffective.

IV. CONCLUSION

Despite remaining abroad for more than 10 years since her last departure from the United States, the Applicant does not qualify for consent to reapply for admission. Also, under the circumstances of her case, *nunc pro tunc* approval would be ineffective.

ORDER: The appeal is dismissed.