U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19629477

Date: MAY 31, 2022

Appeal of Los Angeles County, California 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 sections 212(a)(9)(A)(iii) and 212(a)(9)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(9)(A)(iii) and 1182(a)(9)(C)(ii).

The Director of the Los Angeles County, California Field Office denied the Form I-212, Application for Permission to Reapply for Admission to the United States (Form I-212), concluding that the Applicant does not meet the statutory requirements to seek consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act. The Director also determined that the Applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act based on his 1994 conviction for a controlled substance offense, a ground of inadmissibility for which there is no waiver, and therefore concluded that the Form I-212 could also be denied as a matter of discretion. On appeal, the Applicant contests his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, asserting that his conviction was vacated because a court found a procedural or substantive defect in the underlying criminal proceeding. He does not directly contest the Director's determination that he is ineligible to file a Form I-212 to seek relief under section 212(a)(9)(C)(ii) of the Act.

In this proceeding, the Applicant bears the burden to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). This office reviews the questions in this matter *de novo*. *See 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)(ii) of the Act provides, in part, that a noncitizen, other than an "arriving alien," who has been ordered removed under section 240 or any other provision of law, or who departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such departure or removal, is inadmissible. Noncitizens found inadmissible under section 212(a)(9)(A) of the Act may seek permission to reapply for admission under section 212(a)(9)(A)(iii) if prior to the date of the reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Secretary of Homeland Security has consented to the noncitizen's reapplying for admission.

Section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), 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 ten 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

The Applicant is a native and citizen of El Salvador who entered the United States without being inspected and admitted or paroled in [redacted] 1996. In [redacted] 1996, the Applicant was ordered deported by an Immigration Judge, pursuant to section 241(a)(1)(B) of the Act, for having entered the United States without inspection. Shortly thereafter, the Applicant was deported to El Salvador. The record reflects that the Applicant reentered the United States in December 2001, without being admitted or paroled and without permission to reapply for admission. The Applicant indicates that he has remained in the United States since that time. He indicated on his Form I-212 that he is inadmissible under sections 212(a)(9)(A)(i) and 212(a)(9)(C)(i)(II) of the Act.[1]

The record reflects that the Applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130). As he currently resides in the United States, he is seeking conditional approval of his application under the regulation at 8 C.F.R. § 212.2(j) before departing the United States to apply for an immigrant visa.[2]

The Director denied the Form I-212, concluding that the Applicant is inadmissible based on a conviction for a controlled substance offense under section 212(a)(2)(A)(i)(II) of the Act, a ground for which there is no available waiver.[3] The Director, citing *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg. Comm'r 1963), observed that if an applicant would remain inadmissible even if a waiver is granted, that remaining inadmissibility may itself support denial of this application as a matter of discretion.

Further, the Director determined that even if the Applicant were not inadmissible under section 212(a)(2)(A)(i)(II) of the Act, he is inadmissible under section 212(a)(9)(C)(i)(II) for reentering the United States without being admitted or paroled after having been removed from the United States. The Director emphasized that consent to reapply for permission to enter the United States under section 212(a)(9)(C)(ii) can only be granted if the applicant has departed the United States, is currently abroad, and is seeking permission to reapply for admission at least ten years after the date of their last departure. The Director determined that the Applicant, who has been residing in the United States

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[1] Section 212(a)(9)(A)(i) of the Act applies to noncitizens who were removed as "arriving aliens," as defined at 8 C.F.R. § 1.2. The record reflects that the Applicant was deported in 1996 as a noncitizen present without lawful admission and is inadmissible under section 212(a)(9)(A)(ii) rather than as an "arriving alien" under section 212(a)(9)(A)(i) of the Act.

[2] The approval of his application under these circumstances is conditioned upon the Applicant's departure from the United States and would have no effect if he fails to depart.

[3] The Applicant was charged and convicted for violations of sections 11359 and 11360(a) of the California Health & Safety Code, for possession and transportation of marijuana for sale.

since reentering without admission or parole following his deportation, does not meet these requirements and therefore denied the application.

On appeal, the Applicant objects to the Director's determination that he is inadmissible for a controlled substance violation under section 212(a)(2)(A)(i)(II) and submits additional court records. He asserts that these records demonstrate that his conviction was vacated under California Penal Code § 1016.5 due to procedural or substantive defects in the proceeding, and that he no longer has a conviction for immigration purposes.[4]

We note that the Director observed that it appeared the Applicant's conviction was dismissed under a rehabilitative provision of the California Penal Code, rather than a provision that vacated the conviction based on a procedural or substantive defect. The evidence submitted on appeal suggests that the conviction was in fact ultimately vacated on substantive or procedural grounds in 2017 and the record does not adequately support the Director's determination that the Applicant has a non-waivable ground of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. However, as the Applicant indicates that he intends to apply for an immigrant visa abroad, the U.S. Department of State will make the final determination regarding his admissibility under section of 212(a) of the Act.

As noted, however, the Director did not simply deny the Form I-212 as a matter of discretion based on a determination that the Applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Rather, the Director concluded that that Applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) and is not eligible to be granted consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act, which is the specific form of relief he sought by filing the Form I-212.

The Applicant's brief in support of the appeal does not directly address his inadmissibility under section 212(a)(9)(C)(i) of the Act or his eligibility for the exception to this inadmissibility available under section 212(a)(9)(C)(ii). Counsel states:

> As to inadmissibility under INA 212(a)(9)(A)(i), the applicant was not afforded several forms of relief due to his conviction and ordered deported. The applicant had filed for Temporary Protected Status that was denied due to his conviction. He also was not eligible for relief in the immigration court due to his conviction. Had it not been for the wrongful conviction, the applicant would not have left the country. Had the applicant not returned he would not have had his criminal conviction overturned under the violation of his rights.

[4] Under the current statutory definition of "conviction" set forth in section 101(a)(48)(A) of the Act, "a state action that purports to abrogate what would otherwise be considered a conviction, as the result of the application of a state rehabilitative statute, rather than as the result of a procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether an alien has been convicted for immigration purposes." *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, does not expunge a conviction for immigration purposes. *See id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a conviction is vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the noncitizen remains "convicted" for immigration purposes), *reversed on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

Counsel appears to suggest that the Applicant's inadmissibility for entering the United States without inspection following his deportation stems from a conviction that has since been vacated. However, the record reflects that the Applicant entered without inspection in [redacted] 1996 and was deported in [redacted] 1996 because he was a noncitizen present without lawful admission; he was not deported due to his conviction. When he reentered without inspection in 2001, he became inadmissible under section 212(a)(9)(C)(i)(II) of the Act for reasons unrelated to his criminal record, and as correctly determined by the Director, he cannot be granted consent to reapply under section 212(a)(9)(C)(ii) of the Act. Such consent can only be granted to an applicant who has departed the United States, is currently abroad, and is seeking permission to reapply for admission at least ten years after the date of their last departure. The Applicant does not specifically contest the Director's determination or claim that he meets these eligibility requirements.

We agree with the Director's conclusion that, to avoid inadmissibility under section 212(a)(9)(C)(i) of the Act, it must be demonstrated that the noncitizen's last departure was at least 10 years ago, they have remained outside the United States, and USCIS has granted them permission to reapply for admission into the United States. *Id.* In this case, the Applicant has remained in the United States following his unlawful entry in 2001. He is therefore currently statutorily ineligible to apply for permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act. For this reason, the application will remain denied.

ORDER: The appeal is dismissed.